ECONOMICS OF DEFENSE POLICY: ADM. H. G. RICKOVER

HEARING

BEFORE THE

JOINT ECONOMIC COMMITTEE CONGRESS OF THE UNITED STATES

NINETY-SEVENTH CONGRESS

SECOND SESSION

PART 5

LAWYERS AND LEGAL ETHICS

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DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
24 January 1975

MEMORANDUM FOR THE GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

Subj: Recommendation to Disqualify Certain Law Firms From Representing Companies on Claims in Which Their Attorneys Originally Represented the Government

1. Knowing your desire to improve the Government's posture regarding shipbuilding claims, I am bringing to you a matter in your area which needs corrective action.

2. As you know, I am strongly opposed to the practice of Government attorneys swapping sides and representing contractors in claims against the Government. Navy lawyers, however, have held steadfastly that there is nothing illegal or improper with this practice so long as the attorney does not personally get involved:

- In any case in which he previously represented the Government, or,
- For a period of one year, in any case which fell under the authority of his former position in Government, even if he were not personally involved.

As a result, many former Government officials have left to become claims attorneys.

3. I have looked into the matter further and discovered that the American Bar Association's Canons of Ethics prohibit a law firm from representing a client if one of its members is prohibited from doing so. The Department of Defense has continued to do business with law firms which do not live up to this standard. Let me describe one recent example for you.

4. The firm of Sellers, Connor, and Cuneo is representing shipbuilders in claims against the Navy valued by the contractors in the hundreds of millions of dollars. Faced with this large backlog, the firm has recently hired two more senior Government officials who were working in the claims area. One was a senior official from the Armed Services Board of Contract Appeals; the other was the Deputy Counsel in charge of claims for the Naval Ship Systems Command (now the Naval Sea Systems Command). I will limit my comments to the latter man.

5. The Deputy Counsel for Claims was responsible for analyzing the shipbuilders' claims, advising the Navy claims team on entitlement, collecting evidence, and preparing the Government defense and any counterclaims the Navy might have against the shipbuilders. This responsibility covered virtually every shipbuilding claim that the Cuneo firm is involved in. He played a major role in developing the Government's positions in these cases and should have intimate knowledge of the Government's defenses. He knows the Government's legal positions, its evidence, and its witnesses. Now that the Cuneo firm has hired him, the firm is privy to Navy inside information. If the Deputy Counsel himself represented the shipbuilders referred to above as clients of his firm, he would be violating a statute and he would be subject to criminal penalties.

6. The canons of the legal profession dictate that the Cuneo firm should withdraw from all claims involving the Naval Sea Systems Command except those claims submitted subsequent to the firm's hiring of the former Deputy Counsel. Relevant formal opinions rendered by the American Bar Association Committee on Professional Ethics state the following:

- In the case of ... "two lawyers desiring to form a partnership where they have presently many cases against each other," the Standing Committee on Professional Ethics ruled, "if the lawyers in that situation desire to form a partnership I see no alternative to their dropping out of both sides of each such cases." (sic) (Informal Opinion Number 437)

- As to how the above restriction on individual lawyers applies to other members of their law firm, the Standing Committee on Professional Ethics has ruled:

  ... "the relations of partners in a law firm are so close that the firm, and all members therein, are barred from accepting any employment, that one member of the firm is prohibited from taking." (Formal Opinion Number 33)

  "... anything which requires a lawyer to withdraw from a case requires that his partners withdraw." (Formal Opinion Number 50)

> "... an attorney may not represent a client if he will be required to attack the testimony of his partner."
> (Formal Opinion Number 220)

Despite these specific rulings, the Cuneo firm has not withdrawn from any of the cases which fall within the purview of these rulings. Nor have I seen any effort by the Defense Department to insist that the law firms it deals with conduct business in accordance with the standard of ethics established by the legal profession.

7. There may well be other instances wherein law firms for defense contractors are engaging in unethical practices before defense agencies or before the Armed Services Board of Contract Appeals. For example, I understand that two attorneys, formerly employed by the Naval Air Systems Command, are now associated with a Washington law firm and are working on a claim by a NAVAIR contractor against the Navy. All situations of that nature would also seem to warrant investigation.

8. In the interest of handling claims on a more business-like basis and to discourage the unethical and improper practice of law by claims firms, I recommend that you:

a. Make a formal complaint to the American Bar Association Committee on Ethics concerning the conduct of Sellers, Connor & Cuneo.

b. Have the Military Departments and the Defense Supply Agency identify to you all cases of Government attorneys swapping sides during litigation before the Armed Services Board of Contract Appeals, or any other tribune, or during investigation, review or negotiation of claim settlements.

c. Take action to get the Rules of the Armed Services Board of Contract Appeals amended to bar law firms from representing a contractor before the Board in any case in which one or more of the firm's members previously represented the Government or is disqualified from representing the contractor under any statute or regulation.

d. Instruct all elements of the Department of Defense not to conduct business with law firms in cases such as those described in (c) above.

9. I would appreciate being informed of the action you take in this matter.

H. G. Rickover

Copy to:
Secretary of the Navy
Chief of Naval Operations
Chief of Naval Material
Commander, Naval Sea Systems Command
NAVSEA 00L
NAVSEA 02

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
08
27 FEB 1975

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Subj: Disqualification of Law Firms From Representing Companies or Claims in Which Their Attorneys Originally Represented the Government

Ref: (a) My Memorandum to you dtd 24 Jan 1975
(b) Mr. Cuneo's ltr to you dtd Feb 5, 1975

Encl: (1) Memorandum to ADM Rickover dtd 20 Feb 1975

1. In reference (a) I pointed out that the American Bar Association's Canons of Ethics prohibited a law firm from representing a client if one of its members is prohibited from doing so. On this basis the law firm of Sellers, Conner and Cuneo should withdraw from all claims involving the Naval Sea Systems Command (NAVSEA) except those claims submitted subsequent to that firm's hiring of the former NAVSEA Deputy Counsel, Mr. N. H. Ruttenberg. I recommended that you make a formal complaint to the American Bar Association concerning the conduct of Sellers, Conner and Cuneo and that you instruct all elements of the Department of Defense, including the Armed Services Board of Contract Appeals, not to deal with law firms on a matter on which one or more of the firm's attorneys previously represented the government.

2. Through Navy sources, Mr. Cuneo of Sellers, Conner and Cuneo obtained a copy of reference (a). I understand he met with you on 30 January 1975 to discuss my memorandum and then followed up that meeting with a 5 February 1975 letter on the same subject (reference (b)). Mr. Cuneo sent me a copy of reference (b) which states why he believes his firm has not violated the Canons of Ethics. In reference (b), Mr. Cuneo also attempts to rationalize his possession of reference (a), leaving the impression that it was with the approval of a member of my staff.

3. In my opinion, reference (b) only obfuscates the issues. Mr. Cuneo's arguments can be summarized as follows:

a. Mr. Ruttenberg's employment with the firm does not violate existing statutes.

b. It is too late for the Navy to object to Mr. Ruttenberg's employment by Sellers, Conner, and Cuneo; Navy officials knew of, and approved, Mr. Ruttenberg's employment by the Cuneo firm, and the firm relied on that approval.

c. All the opinions of the Ethics Committee cited in my memorandum apply only to "partners." Since Mr. Ruttenberg is an "associate" and Mr. Shedd, former Vice Chairman of the Armed Services Board of Contract Appeals, is "of counsel," the cited opinions do not apply and there is no violation.

d. The firm has issued instructions that others in the firm are not to attempt to obtain knowledge from Mr. Ruttenberg or Mr. Shedd in matters which were under their cognizance and responsibility while they were with the Government.

e. If the Cuneo firm were disqualified from all matters in which Mr. Ruttenberg could not represent them, Government counsel similarly would be disqualified in cases where the Government has hired lawyers from private enterprise who have worked on claims now being presented to the Government. Among the attorneys who would come under such a proposed ban would be a number of former Secretaries and other high officials of the military departments, as well as the Department of Defense. The consequences of such a policy would be very harmful to the Government.

4. Regarding 3(a) and 3(b) above, the issue is not whether Mr. Ruttenberg's employment by Sellers, Conner, and Cuneo is illegal. Rather, the issue is whether the Department of Defense will continue to deal with law firms such as Sellers, Conner, and Cuneo in matters where, according to the Canons of Ethics, their continued participation constitutes unethical conduct. The fact that Navy officials knew in advance of Mr. Ruttenberg's proposed employment, and did not heretofore object, is irrelevant to this basic issue.

5. Regarding 3(c) and 3(d) above, Mr. Cuneo's points are also invalid. As I pointed out in reference (a), the American Bar Association's Committee on Professional Ethics has published several opinions which indicate that Mr. Cuneo's law firm should withdraw from all claims involving the Naval Sea Systems Command, except those claims submitted subsequent to the firm's hiring of Mr. Ruttenberg. Specifically:

- In the case of ... "two lawyers desiring to form a partnership where they have presently many cases against each other," the Standing Committee on Professional Ethics ruled, "if the lawyers in that situation desire to form a partnership I see no alternative to their dropping out of both sides of each such cases." (sic) (Informal Opinion Number 437)

- As to how the above restriction on individual lawyers applies to other members of their law firm, the Standing Committee on Professional Ethics has ruled:

> ... "the relations of partners in a law firm are so close that the firm, and all members therein, are barred from accepting any employment, that one member of the firm is prohibited from taking." (Formal Opinion Number 33)
>
> "... anything which requires a lawyer to withdraw from a case requires that his partners withdraw." (Formal Opinion Number 50)
>
> "... an attorney may not represent a client if he will be required to attack the testimony of his partner." (Formal Opinion Number 220)

These ethical standards are worthless if law firms could circumvent them simply, (i) by labeling certain members "associates" or "of counsel" instead of "partner"; or, (ii) by mere notification to the firm's members that they are not to give, or attempt to obtain, knowledge from certain other members of the firm regarding matters formerly under their cognizance when they were representing the other side.

6. I agree with Mr. Cuneo's premise that the Department of Defense should apply the same ethical standards to its own attorneys that it expects private firms to apply to theirs. To avoid potential conflicts of interest, or the appearance thereof, I believe the military departments should neither recruit nor hire attorneys who have been representing contractors on legal matters against those same departments. In current situations where, according to the Canons of Ethics, a Government attorney's former employment might ban involvement by other departmental attorneys, other arrangements--such as hiring outside counsel--could be made.

7. In regard to Mr. Cuneo's receiving a copy of my memorandum (reference (a)), he states in reference (b) that "... I only came into possession of such memorandum after being assured that Mr. McGowan (sic), counsel for Admiral Rickover, knew and did not dissent to the delivery of the memorandum to me." Enclosure (1) is Mr. MacGowan's account of his involvement in the matter. In enclosure (1) Mr. MacGowan points out that:

a. He has had no dealings of any kind with the Sellers, Conner, and Cuneo firm regarding my reference (a) memorandum.

b. In a telephone call on the evening of January 27, 1975, Counsel, NAVSEA told Mr. MacGowan he was sending a copy of my memorandum to Mr. Ruttenberg. Mr. MacGowan was not asked for his concurrence nor did he give it.

c. The following morning Mr. MacGowan called Counsel, NAVSEA to advise him not to release my memorandum without first checking with me, since I had signed the memorandum. Counsel, NAVSEA, said it was too late; he had already sent my memorandum to Mr. Ruttenberg.

8. When I subsequently asked the Counsel, NAVSEA why he sent my memorandum to Mr. Ruttenberg, he replied it was only "fair" that Mr. Ruttenberg know about the criticism I raised. Thus, instead of being an advocate for the Navy in this case, Counsel, NAVSEA became a judge. That Mr. Cuneo mentions

Mr. MacGowan by name, in connection with the release of my memorandum shows that Counsel, NAVSEA did more than simply send Mr. Ruttenberg a copy of my memorandum. Apparently he relayed to Mr. Ruttenberg or his firm the telephone discussion he had with Mr. MacGowan on the evening of 27 January 1975. It seems to me that in this instance Counsel, NAVSEA did a better job of representing Mr. Ruttenberg than he did in representing the Navy. This is one of the dangers when the interchange of Government and contractor personnel is allowed to go unchecked.

9. In summary, I believe the recommendations I made in reference (a) are still valid and should be implemented, Mr. Cuneo's letter not withstanding. Specifically I again recommend that you:

a. Make a formal complaint to the American Bar Association Committee on Ethics concerning the conduct of Sellers, Corner and Cuneo.

b. Have the military departments and the Defense Supply Agency identify to you all cases of Government attorneys swapping sides during litigation before the Armed Services Board of Contract Appeals, or any other tribune, or during investigation, review, or negotiation of claim settlements.

c. Take action to have the Rules of the Armed Services Board of Contract Appeals amended to bar law firms from representing a contractor before the Board in any case in which one or more of the firm's members previously represented the Government, or is disqualified from representing the contractor under any statute or regulation.

d. Instruct all elements of the Department of Defense not to conduct business with law firms in cases such as those described in (c) above.

10. I would appreciate being informed of the action you take in this matter.

H. G. Rickover

Copy to:
Secretary of the Navy
Chief of Naval Operations
Chief of Naval Material
The General Counsel of the Navy
Commander, Naval Sea Systems Command
*Counsel, Naval Sea Systems Command

*Note for Counsel, Naval Sea Systems Command:
This document or information contained therein is not to be released by you outside the U.S. Government without approval of The General Counsel, Department of Defense.

DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20360

8 April 1975

Committee on Professional Ethics
American Bar Association
1155 East 60th Street
Chicago, IL 60637

Gentlemen:

Your advice is solicited on the following situation confronting the Office of the General Counsel for the Department of the Navy in relation to the Code of Professional Responsibility of the American Bar Association and the codes adopted by the Bars of the District of Columbia and Virginia.

An Attorney formerly employed in a major subdivision of this Office and while so employed was deputy counsel there, responsible for and involved in analyzing and preparing the Navy's position in defense of certain claims brought before the Navy by several corporations. Our Office, including that subdivision, is located in Virginia and transacts its business throughout the United States.

While still employed by us, the attorney gave proper notice to his supervisors that he desired to commence negotiating for employment with a specific law firm located in the District of Columbia. Partners and associates of that firm had been and continue to be engaged in representing the same corporations referred to above in the prosecution of those same claims against the Navy. Our employee declared himself disqualified from any further activity in connection with those claims during his negotiations. He advised us, by copy of a paper which he submitted to that firm, that he had identified to his prospective employers the extent of his disqualification under sections 207 and 208 of Title 18, United States Code, and under regulations issued by the Navy and Department of Defense governing standards of conduct of its employees.

Under those statutes, the attorney declared, he regarded himself under a lifetime prohibition from representing anyone other than the Navy in connection with the claims being prosecuted by two of those corporations (because he had participated in them personally and substantially for the Government) and under a like prohibition for one year's duration in connection with the claim of the third corporation, (because the claim was under his official responsibility, although he had not personally and substantially participated in it).

During the summer of 1974, the attorney left our employ and took a position as an associate in the law firm in question. We have no information that the attorney, in his new employment, is personally involved in the Navy claims, and the law firm has asserted that he is not involved.

From the point of view of the ethical considerations as stated in the Code of Professional Responsibility, however, Disciplinary Rule 5-105(D), DR 9-101(B), and Ethical Consideration 9-3 appear to be relevant. Prior to February 1974, DR 5-105(D) read as follows:

> "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

Subsequently, in February 1974, the Code was revised so that DR 5-105(D) now reads as follows:

> "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

This amendment, along with others made at the same time, apparently was not published until late in 1974. EC 9-3 provides:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

DR 9-101(B) implements ER 9-3 as follows:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

If DR 5-105(D), as amended last year, is intended, as it appears to read, for that Rule to encompass DR9-101(B), then the Code as applied to the above-described situation would appear to have been contravened.

It is also noted that the Code must be adopted by each local bar jurisdiction. The Preliminary Statement to the Code states:

> "The Code is designed to be adopted by appropriate agencies both as an inspirational guide

> to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules."

Disciplinary Rule 5-105(D) as adopted by the District of Columbia, where the law firm involved is located, is different from its ABA equivalent and reads as follows:

> "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment." [Emphasis supplied]

This current D.C. Rule appears to have incorporated the comparable ABA Rule prior to the amendment to the latter in February 1974.

Despite the existing differences in terminology between the Codes of the American Bar Association and the Bar of the District of Columbia, we feel that the law firm, in continuing to represent the aforementioned corporations in their claims against the Navy, and as to which this Office provides legal representation to the Navy, may be acting in contravention of the standards of professional conduct imposed by both Codes.

In view of the foregoing, we would be grateful for your prompt advice as to whether this Office should continue to deal with the law firm regarding the claims in question.

Sincerely,

E. Grey Lewis

E. GREY LEWIS
General Counsel

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

4 Nov 1975

Mr. Lawrence E. Walsh, President
American Bar Association
One Chase Manhattan Plaza
New York, New York 10005

Dear Mr. Walsh:

I wish to solicit your help in a matter of importance to the Navy and to the American Bar Association. About seven months ago, the General Counsel of the Navy asked the American Bar Association to render an opinion on a question of legal ethics. The case involves a law firm which continues to represent clients in matters against the Navy in apparent violation of the Canons of Ethics. A copy of this letter is enclosed for your reference.

The issue is a simple one. A law firm representing shipbuilders on claims against the Navy, hired the Deputy Counsel for Claims, Naval Sea Systems Command, who was responsible for those same claims while with the Navy. He had been with the Navy for approximately ten years and had an intimate knowledge of the Navy's legal positions on shipbuilding claims, of Navy witnesses, and documentation. These shipbuilding claims are highly complex both legally and technically and involve hundreds of millions of dollars. Even though I am not an attorney, the rules and opinions of your Association as they relate to this situation seem clear. Rule DR9-101(B) reads: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

The former Deputy Counsel concedes that he is barred by statute from representing contractors in matters formerly under his cognizance. Yet, his new employer has refused to withdraw from cases involving those same matters as required by Rule DR5-105(D) which states:

> "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or with his firm, may accept or continue such employment."

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Prior opinions of the American Bar Association in similar cases have been clear. For example,

- In the case of ". . .two lawyers desiring to form a partnership where they have presently many cases against each other," the Standing Committee on Professional Ethics ruled, "if the lawyers in that situation desire to form a partnership I see no alternative to their dropping out of both sides of each such cases." (sic) (Informal Opinion Number 437)

- As to how the above restriction on individual lawyers applies to other members of their law firm, the Standing Committee on Professional Ethics has ruled:

  ". . .the relations of partners in a law firm are so close that the firm, and all members therein, are barred from accepting any employment, that one member of the firm is prohibited from taking." (Formal Opinion Number 33)

  ". . .anything which requires a lawyer to withdraw from a case requires that his partners withdraw." (Formal Opinion Number 50)

After I raised this issue with my superiors, the Navy General Counsel referred the matter to the American Bar Association for a formal opinion. In the meantime, the law firm has continued to represent clients to the Navy in cases that appear to be in direct violation of the American Bar Association's Canons of Ethics. I understand the American Bar Association has not yet rendered an opinion.

I realize you are a busy man and may be unfamiliar with this affair. However, there is considerable congressional interest in the Navy's shipbuilding claims problem and, in particular, in the issue referred to above. The long delay in deciding this case reflects adversely on the American Bar Association.

I anticipate being called to testify before Congress again in the near future. I would like to be in a position to report what action the American Bar Association has taken on this matter since it aroused considerable interest when I

testified before. In this regard, I would appreciate your help in resolving this matter promptly. I would also appreciate being informed of the date by which your organization will issue its opinion.

H. G. Rickover

Copy to:
Chief of Naval Material
Commander, Naval Sea Systems Command
General Counsel, Department of Defense
General Counsel, Department of the Navy

Enclosure:
As stated

DEPARTMENT OF THE NAVY
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D. C. 20360

8 April 1975

Committee on Professional Ethics
American Bar Association
1155 East 60th Street
Chicago, IL 60637

Gentlemen:

Your advice is solicited on the following situation confronting the Office of the General Counsel for the Department of the Navy in relation to the Code of Professional Responsibility of the American Bar Association and the codes adopted by the Bars of the District of Columbia and Virginia.

An Attorney formerly employed in a major subdivision of this Office and while so employed was deputy counsel there, responsible for and involved in analyzing and preparing the Navy's position in defense of certain claims brought before the Navy by several corporations. Our Office, including that subdivision, is located in Virginia and transacts its business throughout the United States.

While still employed by us, the attorney gave proper notice to his supervisors that he desired to commence negotiating for employment with a specific law firm located in the District of Columbia. Partners and associates of that firm had been and continue to be engaged in representing the same corporations referred to above in the prosecution of those same claims against the Navy. Our employee declared himself disqualified from any further activity in connection with those claims during his negotiations. He advised us, by copy of a paper which he submitted to that firm, that he had identified to his prospective employers the extent of his disqualification under sections 207 and 208 of Title 18, United States Code, and under regulations issued by the Navy and Department of Defense governing standards of conduct of its employees.

Under those statutes, the attorney declared, he regarded himself under a lifetime prohibition from representing anyone other than the Navy in connection with the claims being prosecuted by two of those corporations (because he had participated in them personally and substantially for the Government) and under a like prohibition for one year's duration in connection with the claim of the third corporation, (because the claim was under his official responsibility, although he had not personally and substantially participated in it).

During the summer of 1974, the attorney left our employ and took a position as an associate in the law firm in question. We have no information that the attorney, in his new employment, is personally involved in the Navy claims, and the law firm has asserted that he is not involved.

From the point of view of the ethical considerations as stated in the Code of Professional Responsibility, however, Disciplinary Rule 5-105(D), DR 9-101(B), and Ethical Consideration 9-3 appear to be relevant. Prior to February 1974, DR 5-105(D) read as follows:

> "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment."

Subsequently, in February 1974, the Code was revised so that DR 5-105(D) now reads as follows:

> "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

This amendment, along with others made at the same time, apparently was not published until late in 1974. EC 9-3 provides:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

DR 9-101(B) implements ER 9-3 as follows:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

If DR 5-105(D), as amended last year, is intended, as it appears to read, for that Rule to encompass DR9-101(B), then the Code as applied to the above-described situation would appear to have been contravened.

It is also noted that the Code must be adopted by each local bar jurisdiction. The Preliminary Statement to the Code states:

> "The Code is designed to be adopted by appropriate agencies both as an inspirational guide

> to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules."

Disciplinary Rule 5-105(D) as adopted by the District of Columbia, where the law firm involved is located, is different from its ABA equivalent and reads as follows:

> "If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment." [Emphasis supplied]

This current D.C. Rule appears to have incorporated the comparable ABA Rule prior to the amendment to the latter in February 1974.

Despite the existing differences in terminology between the Codes of the American Bar Association and the Bar of the District of Columbia, we feel that the law firm, in continuing to represent the aforementioned corporations in their claims against the Navy, and as to which this Office provides legal representation to the Navy, may be acting in contravention of the standards of professional conduct imposed by both Codes.

In view of the foregoing, we would be grateful for your prompt advice as to whether this Office should continue to deal with the law firm regarding the claims in question.

Sincerely,

E. Grey Lewis

E. GREY LEWIS
General Counsel

ABA AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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cc: Adm. Rickover

November 24, 1975

E. Grey Lewis, Esq.
General Counsel
Department of the Navy
Office of the General Counsel
Washington, DC 20360

Re: Informal Opinion 1336 - F. O. 342

Dear Mr. Lewis:

I am sorry you were unable to get to my office as suggested on November 14. However, our Committee has now issued its Formal Opinion 342, and I am herewith enclosing a copy. It seems to me that this opinion finally provides a long overdue answer to your inquiry concerning the disqualification of a law firm hiring a government lawyer who previously worked on a case which the law firm was handling. If you have any further questions, please get in touch with me. We do appreciate your patience.

Sincerely,

Lewis H. Van Dusen, Jr.

LHVDjr/rnb
cc: Committee Members; C. Russell Twist, Esq.

Enclosure

FINAL

Dated: 11/24/75

FORMAL OPINION 342

Following the 1974 amendment of DR 5-105(D), which extended every disqualification of an individual lawyer in a firm to all affiliated lawyers,[1] the interpretation and application of DR 9-101(B) have been increasingly of concern to many government agencies as well as to many former government lawyers now in private practice.[2] DR 9-101(B) is based upon former ABA Canon 36, but its standard or test is different. Our task is to interpret DR 9-101(B) in light of its history and in consideration of its underlying purposes and policies.

DR 9-101(B) reads as follows:

> A lawyer shall not accept private employment in a manner in which he had substantial responsibility

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1/ As amended at the Mid-Winter meeting of the ABA in February 1974, DR 5-105(D) provides: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." Prior to amendment, the rule undertook to disqualify all such affiliated lawyers only when the lawyer in question was "required to decline employment or to withdraw from employment under DR 5-105..." But see fn. 2, infra.

2/ It has long been recognized that the disqualification of one lawyer in an organization generally constituted disqualification of all affiliated lawyers; see e.g., American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Laskey Bros. of W. Va. v. Warner Bros. Pictures, 224 F.2d 824 (2nd Cir. 1955); Silver Chrysler Plymouth v. Chrysler Motors Corp., 370 F.Supp. 581 (E.D. N.Y. 1973), aff'd. ____ F.2d ____ (2nd Cir. 1975); W. E. Basset Co. v. H. C. Cook Co., 201 F.Supp. 321 (D. Conn. 1962); Formal Opinions 169 (1937), 49 (1931), 33 (1931, and 16 (1929); Informal Opinions 1336 (1975), and 906 (1966); Texas Ethics Comm. Opinion 100 (1954); Perkins, The Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1162 (1963); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657, 660 (1957); Kaplan, Forbidden Retainers, 31 N.Y.U. L.Rev. 914, 926 (1956); Casenote, 69 Harv. L.Rev. 1339 (1956). The rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment. As to the application of DR 5-105(D) in situations involving DR 9-101(B), see the discussion infra.

while he was a public employee.[3/]

At the outset, the relationship between DR 9-101 (B) and the provisions of Canons 4 (Confidences and Secrets) and 5 (Independent Professional Judgment) should be explored briefly. To some extent, the Disciplinary Rules of those two canons reinforce the same ethical concepts underlying DR 9-101 (B).

The Disciplinary Rules of Canon 4 generally forbid a lawyer to reveal or use a confidence or secret of a client; see DR 4-101 (B). That rule applies to a government lawyer as well as to private practitioners, for "the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities."[4/] A lawyer violates DR 4-101 (B) only by knowingly revealing a confidence or secret of a client or using a confidence or secret improperly as specified in the rule. Nevertheless, many authorities have held that as a procedural matter a lawyer is disqualified to represent a party in litigation if he formerly represented an adverse party in a matter substantially related to the pending litigation.[5/] Even though DR 4-101 (B) is not breached

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3/ The companion provision in the former ABA Canons of Professional Ethics was found in Canon 36 and read as follows: "A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ."

4/ Preliminary Statement, CPR.

5/ See Eale Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2nd Cir. 1973); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D. N.Y. 1973), aff'd. ___ F.2d ___ (2nd Cir. 1975); Humble Oil & Refining Co. v. American Oil Co., 224 F. Supp. 909 (E.D. Mo. 1963); Schmidt v. Pine Lawn Memorial Park, 198 N.W.2d 496 (S.D. 1972); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957); Note, 64 Yale L. J. 917 (1955).

by the mere act of accepting present employment against a former client involving a matter substantially related to the former employment, the procedural disqualification protects the former client in advance of and against a possible future violation of DR 4-101 (B).[6/]

The Disciplinary Rules of Canon 5 bring into professional regulation, and with some specificity, the ancient maxim that one cannot serve two masters.[7/] The disciplinary rules of Canon 5 are concerned largely with the effect of dual representation upon the quality of the professional service rendered to a client. Therefore the rules generally require a lawyer to refuse employment or to withdraw from employment when his exercise

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6/ If this device of a procedural disqualification based upon the substantial relationship of the subject matter of the two employments were not used, the remedy would be either, first, an after-the-fact disciplinary action in which the issue is whether a particular confidence or secret was actually revealed or used improperly, or second, a procedural disqualification based upon the fact issue of whether confidences or secrets were actually revealed in the first employment that are so relevant that they are likely to be revealed or used during the second employment. The "substantially related" test is less burdensome to the client first represented and is less destructive of the confidential nature of the attorney-client relationship. See Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 571 (2nd Cir. 1973) in which it is pointed out that an inquiry, on a procedural motion to disqualify, into actual confidences would prove destructive of the weighty policy considerations that serve as the pillars of Canon 4 of the Code" and that if the procedural disqualification were not used as a prophylactic measure a lawyer might unconsciously or intentionally use a confidence or "out of an excess of good faith, might bend too far in the opposite direction, refraining from seizing a legitimate opportunity for fear that such a tactic might give rise to an appearance of impropriety." Cf. EC 5-14, CPR.

7/ "No man can serve two masters: for either he will hate the one, and love the other: or else he will hold to the one, and despise the other. Ye cannot serve God and mammon." Matthew 6:24. See also Formal Opinions 33 (1931), 71 (1932), and 83 (1932). The latter quoted Hoffman's Eighth Resolution: "If I have ever had any connection with a cause, I will never permit myself (when that connection is for any reason severed) to be engaged on the side of my former antagonist."

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of professional judgment on behalf of a client may be affected; see DR 5-105; EC 5-14; and EC 5-15. The rules also forbid a lawyer to switch sides even in situations where the exercise of the lawyer's professional judgment on behalf of a present client will not be affected.[8/] To this extent, the Disciplinary Rules of Canon 5 regulate the employment a lawyer may undertake after concluding or terminating past employment, whether the past employment was as a private or as a public lawyer.

DR 9-101 (B) appears under the maxim of Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." It is obvious, however, that the "appearance of professional impropriety" is not a standard, test or element embodied in DR 9-101 (B).[9/] DR 9-101 (B) is

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8/ The prohibition against switching sides where the exercise of the lawyer's professional judgment on behalf of a client will not be affected is somewhat obscure. The prohibition is found in DR 5-105 (A) and (B), forbidding the acceptance or retention of employment involving the representation of "differing interests," which is defined as every interest "that will adversely affect either the judgment or the loyalty of a lawyer to a client. . . ." Definitions (1). Generally, see E. F. Hutton & Co. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969).

9/ But cf. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., ___F.2d___ (2nd Cir. 5/23/75); General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir. 1974); Motor Mart, Inc. v. Saab Motors, Inc., 359 F. Supp. 156 (S.D. N.Y. 1973); Hilo Metals Co., Ltd. v. Learner Co., 258 F. Supp. 23 (D. Hawaii 1966); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D. N.Y. 1955); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957). Judge Weinstein made an appropriate comment regarding "Appearances of Impropriety" in Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 589: "Defendants seem to suggest that the complexities of the factual determination to be made by this court should be avoided by a decision couched in notions of possible appearance of impropriety. On the contrary, the importance of the underlying policy considerations call for careful analysis of the matters embraced by previous and present litigations. Vague or indefinite allegations do not suffice. * * * The danger of damage to public confidence in the legal profession would be great if we were to allow unfounded charges of impropriety to form the sole basis for an unjust disqualification."

located under Canon 9 because the "appearance of professional impropriety" is a policy consideration supporting the existence of the Disciplinary Rule. The appearance of evil is only one of the underlying considerations, however, and is probably not the most important reason for the creation and existence of the rule itself.

The policy considerations underlying DR 9-101 (B) have been thought to be the following: the treachery of switching sides;[10/] the safeguarding of confidential governmental information from future use against the government;[11/] the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service;[12/] and the professional benefit derived from

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10/ See Formal Opinion 71 (1932); Kaplan, Forbidden Retainers, 31 N.Y.U. L. Rev. 914, 917 (1956); Ass'n. of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 45 (1960). Thus Canon 5 and DR 9-101 (B) are based at least in part on the same considerations of ethics.

11/ See Allied Realty of St. Paul v. Exchange National Bank of Chicago, 283 F. Supp. 464 (D. Minn. 1968), aff'd 408 F.2d 1099 (8th Cir. 1969); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957). Cf. McKay, An Administrative Code of Ethics: Principles and Implementation, 47 A.B.A. J. 890 (1961). Thus Canon 4 and DR 9-101 (B) are based at least in part on the same considerations of ethics. Speaking of former Canon 36, the forerunner of DR 9-101 (B), Judge Kaufman said: "Canon 36 was designed to supplement the other two [Canons regarding conflicts and confidences], not to replace them." Id. at 660.

12/ "Interviews revealed a substantial body of opinion that government employees who anticipate leaving their agency some day are put under an inevitable pressure to impress favorably private concerns with which they officially deal." Ass'n. of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 233 (1960). See also Allied Reality of St. Paul v. Exchange National Bank of Chicago, 283 F. Supp. 464 (D. Minn. 1968), aff'd. 408 F.2d 1099 (8th Cir. 1969); Milo Metals Co. v. Learner Co., 248 F. Supp. 23 (D. Hawaii 1966); Formal Opinion 37 (1931).

avoiding the appearance of evil.[13/]

There are, however, weighty policy considerations in support of the view that a special disciplinary rule relating only to former government lawyers should not broadly limit the lawyer's employment after he leaves government service. Some of the underlying considerations favoring a construction of the rule in a manner not to restrict unduly the lawyer's future employment are the following: the ability of government to recruit young professionals and competent lawyers should not be interferred with by imposition of harsh restraints upon future practice nor should too great a sacrifice be demanded of the lawyers willing to enter government service;[14/] the rule serves no worthwhile

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13/ See General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir. 1974); Motor Mart v. Saab Motors, Inc., 359 F. Supp. 156 (S. D. N.Y. 1973); Hilo Metals Co., Ltd. v. Learner Co., 258 F. Supp. 23 (D. Hawaii 1966); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D. N.Y. 1955); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957).

14/ "It is not sufficiently recognized that post-employment restrictions can be overly stringent, hurting the government more than they help it. This is most easily seen in the deterrent effect of such regulation upon the government's recruitment of manpower; no man will accept government appointment -- especially temporary government appointment -- if he must abandon the use of his professional skills for several years after leaving government service. The adverse effect of such restrictions on the government's efficient use of skills and information is probably even greater. The knowledge of an experienced former official may be made to operate against the government, but it may also contribute to the ends of the government." Ass'n. of the Bar of the City of New York, CONFLICT OF INTEREST AND FEDERAL SERVICE 224 (1960). It was also said that the "most damaging result of the present system is its deterrent effect on the recruitment and retention of executive and some kinds of consultative talent." Id. at 181.

See also Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D. N.Y. 1973) ("A concern both for the future of young professionals and for the freedom of choice of the litigants in

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public interest if it becomes a mere tool enabling a litigant to improve his prospects by depriving his opponent of competent counsel;[15] and the rule should not be permitted to interfere needlessly with the right of litigants to obtain competent counsel of their own choosing, particularly in specialized areas requiring special, technical training and experience.[16]

DR 9-101 (B) itself, while presumably drafted in the light of the above policy considerations, does not embody any of them as a test. The issue of fact to be determined in a disciplinary action is whether the

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14 contd/ specialized areas of law requires care not to disqualify needlessly"), aff'd. ___ F.2d ___ (2nd Cir. 1975); United States v. Standard Oil Co., 136 F. Supp. 345 (S.D. N.Y. 1955) ("If service with the government will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in practice of the very speciality for which the government sought his service -- and if that sterilization will spread to the firm with which he becomes associated -- the sacrifices of entering government service will be too great for most men to make. As for those men willing to make these sacrifices, not only will they and their firms suffer a restricted practice thereafter, but clients will find it difficult to obtain counsel, particularly in those specialties and suits dealing with the government"); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957) ("The restrictions placed upon [the government attorney's] future career are so unclear and may be so sterilizing that unless he is completely unwary he will hesitate before accepting government employment"); Casenote, 68 Harv. L. Rev. 1084 (1955) (suggesting that a lawyer should not be disqualified in a case involving his specialty unless a hearing, such as an in camera hearing, results in a finding that the information obtained from the client is not available elsewhere by reasonable research); Kaplan, Forbidden Retainers, 31 NYU L. Rev. 914 (1956); Casenote, 64 Yale L. J. 917 (1955) ("Furthermore, the attorney's right to develop a special skill free from unwarranted limitations as to employment must be recognized").

15/ Cf. Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 574 (2nd Cir. 1973).

16/ Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2nd Cir. 1973); Laskey Bros. of W. Va., Inc. v. Warner Bros. Pictures, 224 F.2d 824 (2nd Cir. 1955); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D. N.Y. 1973), aff'd. ___ F.2d ___ (2nd Cir. 1975); Note, 64 Yale L. J. 917 (1955).

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lawyer has accepted "private employment" in a "matter" in which he had "substantial responsibility" while he was a "public employee." Interpretation apparently is needed in regard to each of the quoted words or phrases, and each should be interpreted so as to be consistent, insofar as possible, with the underlying policy considerations discussed above. 17/

As used in DR 9-101 (B), "private employment" refers to employment as a private practitioner. If one underlying consideration is to avoid the situation where government lawyers may be tempted to handle assignments so as to encourage their own future employment in regard to those matters, the danger is that a lawyer may attempt to derive undue financial benefit from fees in connection with subsequent employment, and not that he may change from one salaried government position to another. The balancing consideration supporting our construction is that government

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17/ Perhaps the least helpful of the seven policy considerations mentioned above is that of avoiding the appearance of impropriety. This consideration appears in the heading of Canon 9 and is developed more fully in EC 9-2 and 9-3, thereby giving guidance to lawyers when making decisions of conscience in regard to their professional responsibility. Thus, "avoiding the appearance of evil" is relevant to our task of interpreting DR 9-101 (B), even though it is not relevant when a grievance committee or court is determining whether a violation of the standard of DR 9-101 (B) has in fact occurred. It is fortunate that "avoiding even the appearance of professional impropriety" was not made an element of the disciplinary rule, for it is too vague a phrase to be useful (see McKay, An Administrative Code of Ethics: Principles and Implementation, 47 ABA J. 890, 894 (1961)), and lawyers will differ as to what constitutes the appearance of evil (see Silver Chrysler Plymouth, Inc., v. Chrysler Motors Corp., 370 F. Supp. 581 (E.D. N.Y. 1973), aff'd. ___ F.2d ___ (2nd Cir. 1975)). For the same reasons, the concept is of limited assistance as an underlying policy consideration. If "appearance of professional impropriety" had been included as an element in the disciplinary rule, it is likely that the determination of whether particular conduct violated the rule would have degenerated from the determination of the fact issues specified by the rule into a determination on an instinctive, ad hoc or even ad hominem basis; cf. McKay, supra at 893.

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agencies should not be unduly hampered in recruiting lawyers presently employed by other government bodies.[18]

Although a precise definition of "matter" as used in the Disciplinary Rule is difficult to formulate, the term seems to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties.[19] Perhaps the scope of the term "matter" may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.[20] By contrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101 (B) from subsequent private

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18/ This position is not in conflict with General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir. 1974). In that case it appears that the lawyer for the municipality was privately retained, and the appellate court held that this employment constituted "private employment" within the meaning of DR 9-101 (B).

19/ See Manning, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

20/ See Emle Industries, Inc. v. Patentex, Inc., 478 F.2d 562 (2nd Cir. 1973), where an issue of fact regarding Burlington's control of Patentex was an issue of fact in the earlier litigation as well as in the instant litigation. Similarly, in General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir. 1974), it appeared that many, if not all, of the issues of fact in the two cases involved the same conduct of General Motors that allegedly resulted in monopolizing trade in the manufacture and sale of city buses, and it was held that the same "matter" was involved within the meaning of DR 9-101 (B). In that opinion it was said, at 651: "the district court set forth the proper test (60 F.R.D. at 402): In determining whether this case involves the same matter as the 1956 Bus case, the most important consideration is not whether the two actions rely for their foundation upon the same section of the law, but whether the facts necessary to support the two claims are sufficiently similar."

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employment involving the same regulations, procedures, or points of law; the same "matter" is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties.[21]

The element of DR 9-101 (B) most difficult to interpret in light of the underlying considerations, pro and con, is that of "substantial responsibility." We turn first to the language of the predecessor Canon 36 --- language which was found wanting.

21/ "Many a lawyer who has served with the government has an advantage when he enters private practice because he has acquired a working knowledge of the department in which he was employed, has learned the procedures, the governing substantive and statutory law and is to a greater or lesser degree an expert in the field in which he was engaged. Certainly this is perfectly proper and ethical. Were it not so, it would be a distinct deterrant to lawyers ever to accept employment with the government. This is distinguishable, however, from a situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter", the latter being thought to be within the proscription of former Canon 36; Allied Realty of St. Paul v. Exchange National Bank of Chicago, 283 F. Supp. 464 (D. Minn. 1968), aff'd. 408 F.2d 1099 (8th Cir. 1969). See also B. Manning, FEDERAL CONFLICT OF INTEREST LAW 204 (1964).

A contrary interpretation would unduly interfere with the opportunity of a former lawyer to use his expert technical legal skills, and the prospect of such unnecessary limitations on future practice probably would unreasonably hinder the recruiting efforts of various local, state and federal governmental agencies and bodies.

Our interpretation leaves protection of governmental confidences or information largely to the Disciplinary Rules of Canon 4, which apply to governmental lawyers as well as privately employed lawyers; see fn. 4, supra. This result is consistent with the trend toward "government in the sunshine" and with such statutes as the Freedom of Information Act; cf. National Labor Relations Board v. Sears, Roebuck & Co., 95 S.Ct. 1504 (1975), which discusses the application of that act and its exceptions to the work of government lawyers and generally protects information held by government lawyers when the information falls within the classifications of attorney work product or executive privilege.

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Canon 36, former ABA Canons of Professional Ethics, stated that the former government lawyer should not accept employment in connection with a matter "he has investigated or passed upon" while in government employ. But "passed upon" proved to be too broadly encompassing; for example, it was held under Canon 36 that a lawyer could not accept employment in connection with a land title which he had passed upon in a perfunctory manner, the title having been before him for consideration only because title reports were made in his name as assistant chief title examiner or in the name of the chief title examiner.[22] And if disqualifying a lawyer because of a mere "rubber stamp" approval of the work of another was not bad enough, this committee was confronted with the necessity of either disregarding that language of Canon 36 or holding that a lawyer who was a former governor was disqualified from litigation involving any legislation he had passed upon --- perhaps by vetoing, signing, or permitting to become law without signature --- as governor.[23] Perhaps an extreme in the interpretation of the language was reached when the government contended in one case that a lawyer was barred under Canon 36 when the lawyer "should have passed," even if he had not passed,

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22/ Formal Opinion 37 (1931).

23/ The committee concluded that the governor was not disqualified. Formal Opinion 26 (1930). In the opinion it was observed that the literal language of former Canon 36 would prevent governors and legislators from ever again dealing with any subject studied while in office. "They illustrate that the canon was not intended to have the effect that its words too literally construed imply."

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upon a particular matter.[24/]

Discussions of former canons 6 (predecessor to Canon 5), 36 (predecessor to the Disciplinary Rule in question), and 37 (predecessor to Canon 5) sometimes are worded in terms of "rebuttable presumptions," "irrebuttable presumptions," "rebuttable inferences," "horizontally imputed knowledge," "vertically imputed knowledge," "charged with knowledge," and other conceptions not found in the language of those prior canons or in the language of the present Disciplinary Rules.[25/] To an extent the dis-

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24/ See United States v. Standard Oil Co., 136 F. Supp. 345 (S.D. N.Y. 1955

As to the applicability or interpretation of the "investigated or passed upon" language of former Canon 35, see also United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964); Traylor v. City of Amarillo, Texas, 335 F.Supp. 423 (N.D. Tex. 1971); State of Minn. v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968); Hilo Metals Co. v. Learner Co., 258 F.Supp. 23 (D. Hawaii 1966); Kaplan, Forbidden Retainers, 31 N.Y.U. L. Rev. 914 (1956); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957); Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113 (1963); Casenote, 69 Harv. L. Rev. 1339 (1956); B. Manning, FEDERAL CONFLICT OF INTEREST LAW 196 (1964).

25/ See, e.g., Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., ___F.2d___ (2nd Cir. 5/2/75); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); Laskey Bros. of W. Va. v. Warner Bros. Pictures, 224 F.2d 824 (2nd Cir. 1955); United States v. Standard Oil Co., 136 F.Supp. 345 (S.D. N.Y. 1955); Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657 (1957).

Imputation of knowledge from a lawyer to his firm need not be explored where a lawyer is disqualified by reason of prior representation or employment, for DR 5-105 (D) specifically makes all associated lawyers disqualified and therefore knowledge vel non is irrelevant. Imputation of knowledge is likewise irrelevant in considering the fact issue whether the former government lawyer did in fact personally "investigate or pass upon" a matter; knowledge of close associates or subordinates regarding the matter in question may in some instances be logically relevant in determining whether the lawyer did investigate or pass upon the matter, but to work in terms of "imputed knowledge" tends to fictionalize the factfinding process. Yet, in the application of DR 4-101 (A), a lawyer's knowledge of a confidence or secret may be a highly relevant fact. Under DR 9-101 (B) an issue of fact obviously is whether the lawyer had "substantial responsibility" in regard to the matter in question, rather than whether he posses-

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cussions are confusing and seem to constitute a bit of a tour de force. It is not clear, for example, whether the presumptions in question are intended to have the procedural effect of assuring the sufficiency of evidence on a fact issue, or of shifting a burden of going forward with evidence, or of shifting the burden of persuasion, or, in fact, of constituting a new substantive rule different from that stated in the Canon or Disciplinary Rule in question.[26] Neither is it clear why knowledge should be "imputed" or "charged" to a person, nor, indeed, why knowledge itself, rather than "investigated or passed upon," is even relevant in some instances. But after reading such discussions one senses that there is dissatisfaction with having to make findings of certain facts such as, for example, whether the lawyer in question personally did in fact "investigate or pass upon" the matter in question.[27]

Apparently the new language of DR 9-101 (B), "substantial responsibility," was designed to alleviate some of the difficulties discussed above. The new language is, however, not without its own difficulties.

As used in DR 9-101 (B), "substantial responsibility" envisages a much closer and more direct relationship than that of a mere perfunctory

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26/ Compare with Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 370 F. Supp. 581, 587-8, aff'd. __F.2d__ (2nd Cir. 1975). Generally see McCormick, EVIDENCE 802-6 (2nd Ed. 1972).

27/ For example, Judge Kaufman's discussion suggests that the test whether the government lawyer personally investigated or passed upon the matter in question affords inadequate protection. Many responsible supervisory government officials make decisions based on the work of subordinates, and the work and knowledge of the subordinates may or may not be known to or remembered by the official. See Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657, 666 (1957).

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approval or disapproval of the matter in question.[28] It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. Thus, being the chief official in some vast office or organization does not ipso facto give that government official or employee the "substantial responsibility" contemplated by the rule in regard to all the minutiae of facts lodged within that office.[29] Yet it is not necessary that the public employee or offical shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter.[30] With a responsibility so strong and compelling that he probably became involved in the investigative or decisional processes, a lawyer upon leaving the government service should not represent another in regard to that matter. To do so

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28/ See Informal Opinion 1129 (1969), discussing both DR 9-101 (B) and former Canon 36.

29/ If "official responsibility" had been used in lieu of "substantial responsibility," the scope of DR 9-101 (B) would have been enlarged considerably but perhaps to the detriment of governmental recruiting. Compare Buss, The Massachusetts Conflict-of-Interest Statute: An Analysis, 45 Boston U. L. Rev. 299, 318 (1965).

30/ Compare the views expressed in Kaufman, The Former Government Attorney and the Canons of Professional Ethics, 70 Harv. L. Rev. 657, 667 (1957). See also Perkins, The New Federal Conflict-of-Interest Law, 76 Harv. L. Rev. 1113, 1127 (1963).

would be akin to switching sides, might jeopardize confidential government information, and gives the appearance of professional impropriety in that accepting subsequent employment regarding that same matter creates a suspicion that the lawyer conducted his governmental work in a way to facilitate his own future employment in that matter.

The element of "substantial responsibility" as so construed should not unduly hinder the government in recruiting lawyers to its ranks nor interfere needlessly with the right of litigants to employ technically skilled and trained former government lawyers to represent them.

The last factual element of DR 9-101 (B) deserving explanation is that of "public employee." It is significant that the word lawyer was not used instead of employee. Accordingly, the intent clearly was for DR 9-101 (B) to be applicable to the lawyer whose former public or governmental employment was in any capacity and without regard to whether it involved work normally handled by lawyers.

The extension by DR 5-105 (D) of disqualification to all affiliated lawyers is to prevent circumvention by a lawyer of the Disciplinary Rules. Past government employment creates an unusual situation in which inflexible application of DR 5-105 (D) would actually thwart the policy considerations underlying DR 9-101 (B). The question of the application of DR 5-105 (D) to the situation in which a former government employee would be in violation of DR 9-101 (B) should be considered in the light of those policy considerations, viz: opportunities for government recruitment and the availability of skilled and trained lawyers for litigants should not be unreasonably limited in order to prevent the appearance of switching sides, yet confidential information should be safeguarded, and government

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lawyers should be discouraged from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service. The desire to avoid the appearance of evil, even though less important, must be considered. A realistic construction of DR 5-105(D) should recognize and give effect to the divergent policy considerations when government employment is involved.

When the Disciplinary Rules of Canons 4 and 5 mandate the disqualification of a government lawyer who has come from private practice, his governmental department or division cannot practicably be rendered incapable of handling even the specific matter. Clearly, if DR 5-105(D) were so construed, the government's ability to function would be unreasonably impaired. Necessity dictates that government action not be hampered by such a construction of DR 5-105(D). The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice. This important difference in the adversary posture of the government lawyer is recognized by Canon 7: the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client. The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates. Accordingly, we construe DR 5-105(D) to be inapplicable to other government lawyers associated with a particular government lawyer who is himself disqualified by reason of

DR 4-101, DR 5-105, DR 9-101(B), or similar Disciplinary Rules. Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, and discussion with his colleagues concerning the relevant transaction or set of transactions is prohibited by those rules.

Likewise, DR 9-101(B)'s command of refusal of employment by an individual lawyer does not necessarily activate DR 5-105(D)'s extension of that disqualification. The purposes of limiting the mandate to matters in which the former public employee had a substantial responsibility are to inhibit government recruitment as little as possible and enhance the opportunity for all litigants to obtain competent counsel of their own choosing, particularly in specialized areas. An inflexible extension of disqualification throughout an entire firm would thwart those purposes. So long as the individual lawyer is held to be disqualified and is screened from any direct or indirect participation in the matter, the problem of his switching sides is not present; by contrast, an inflexible extension of disqualification throughout the firm often would result in real hardship to a client if complete withdrawal of representation was mandated, because substantial work may have been completed regarding specific litigation prior to the time the government employee joined the partnership, or the client may have relied in the past on representation by the firm.

All of the policies underlying DR 9-101(B), including the principles of Canons 4 and 5, can be realized by a less stringent application of DR 5-105(D). The purposes, as embodied in DR 9-101(B), of discouraging government lawyers

from handling particular assignments in such a way as to encourage their own future employment in regard to those particular matters after leaving government service, and of avoiding the appearance of impropriety, can be accomplished by holding that DR 5-105(D) applies to the firm and partners and associates of a disqualified lawyer who has not been screened, to the satisfaction of the government agency concerned, from participation in the work and compensation of the firm on any matter over which as a public employee he had substantial responsibility. Applying DR 5-105(D) to this limited extent accomplishes the goal of destroying any incentive of the employee to handle his government work so as to affect his future employment. Only allegiance to form over substance would justify blanket application of DR 5-105(D) in a manner that thwarts and distorts the policy considerations behind DR 9-101(B).

Our conclusion is further supported by the fact that DR 5-105(C) allows the multiple representation that is generally forbidden by DR 5-105(A) and (B), where all clients consent after full disclosure of the possible effect of such representation. DR 5-105(A) and (B) deals, of course, with much more egregious contingencies than those covered by DR 9-101(B). It is unthinkable that the drafters of the Code of Professional Responsibility intended to permit the one afforded protection by DR 5-105(A) and (B) to waive that protection without also permitting the one protected by DR 9-101(B) to waive that less-needed protection. Accordingly, it is our opinion that whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant

impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question.

Although this opinion has dealt explicitly and at length with the interpretation and application of DR 9-101(B), it is not amiss to point out that, on the ethical rather than the disciplinary level of professional responsibility, each lawyer should advise a potential client of any circumstances that might cause a question to be raised concerning the propriety of his undertaking the employment and should also resolve all doubts against the acceptance of questionable employment. See EC 5-105 and EC 5-16.

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DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
4 Nov 1975

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY

Subj: Disqualification of law firms from representing companies on claims in which their attorneys originally represented the Government

Ref: (a) My memo dtd 24 Jan 1975 to the General Counsel, Department of Defense
(b) Letter dtd April 8, 1975 from the General Counsel, Department of the Navy to the American Bar Association, Committee on Professional Ethics

Encl: (1) My letter to Lawrence E. Walsh, President, American Bar Association dtd 4 November 1975

1. In reference (a) I pointed out that the firm of Sellers, Connor, and Cuneo had hired the Deputy Counsel for Claims from the Naval Sea Systems Command; that Sellers, Connor, and Cuneo is representing shipbuilders in claims against the Navy valued by the contractors in the hundreds of millions of dollars; that the former Deputy Counsel had extensive responsibility for preparing the Navy's position on many of these claims. I pointed out that under the American Bar Association's Canons of Ethics, the law firm is obliged to withdraw from those cases for which the Deputy Counsel was responsible. In reference (b) you requested a formal opinion on this matter from the American Bar Association Committee on Professional Ethics.

2. I understand the American Bar Association has still not rendered an opinion. Repeated follow-up efforts by my office to yours have been unsuccessful in precipitating a response from the American Bar Association. Meanwhile, the problem persists. I recently received a copy of the Armed Services Board of Contract Appeals' decision #18503, Appeal of General Dynamics. The company was represented by Sellers, Connor, and Cuneo and the case was one which fell under the authority of the former Deputy Counsel of the Naval Sea Systems Command. As I understand the Bar Association's Canons of Ethics, the Sellers, Connor, and Cuneo firm should not have been allowed to represent the plaintiff in this case. Yet no action was taken to disqualify that firm pending a response from the American Bar Association.

3. It has been over ten months since I first raised this issue officially and seven months since you requested an opinion from the American Bar Association. I believe there has been ample time to resolve the issue. Since there has been more than ample time for the American Bar Association to act, and since it appears you are unable to obtain a reply, I have sent the attached letter directly to the President of the American Bar Association requesting his assistance in this matter. I will provide you a copy of his response.

4. Pending receipt of his response I recommend that you suspend all dealings between the Navy and any law firm on matters in which members of the law firm previously represented the Government or is disqualified from representing the contractor under any statute or regulation.

5. I would appreciate being informed of what action you plan to take in this regard.

H. G. Rickover

Copy to:
Assistant Secretary of the Navy
(Installations & Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

18 November 1975

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY

Subj: Disqualification of law firms from representing companies on claims on which their attorneys originally represented the Government

Ref: (a) My memo to you dtd 4 Nov 75, same subject
(b) Your memo to me dtd 5 Nov 75, same subject

1. By reference (a) I forwarded to you a copy of a letter I wrote to the President of the American Bar Association (ABA) regarding disqualification of law firms on claims on which their attorneys originally represented the Government. I requested his assistance in obtaining the ABA's opinion on the matter since you had requested such a ruling seven months ago but had not yet received a response. In reference (a) I recommended that, pending receipt of that response, you should suspend all dealings between the Navy and any law firm on matters in which members of the law firm previously represented the Government or is disqualified from representing the contractor under any statute or regulation.

2. By reference (b) you responded that you "fully share" my impatience with the failure of the ABA to respond to your request for an opinion on this question. However, you stated that, in your opinion, my letter to Judge Walsh, the President of the ABA was unnecessary because you met with him several weeks ago and because you had written to Mr. Van Dusen, the Chairman of the Ethics Committee, as late as October 29, 1975.

3. It was well over a year ago since the Deputy Counsel for the Naval Sea Systems Command joined the law firm of Sellers, Connor, and Cuneo, and that firm has continued to represent clients to the Navy in apparent violation of the ABA's Code of Professional Ethics. The Navy itself took no action until I raised the ethics issue in my memorandum of 24 January 1975, some six months later. Now another nine months have elapsed without any results despite your visit with the President of the ABA, your letter to Mr. Van Dusen, or such other follow up efforts as you may have made.

4. I wrote directly to the President of the ABA because action is needed and it has not been forthcoming. The Sellers, Connor, and Cuneo firm, in apparent violation of the Code of Professional Ethics, continues to be involved with the Navy in claims and other matters totaling hundreds of millions of dollars. Further delay compounds the very inequities the Code of Professional Ethics was designed to preclude.

5. I have never understood why the Navy, on its own, is unable to apply the Code of Professional Ethics--without reference to the ABA. Moreover, the long delay by the ABA in responding to the Navy's request necessarily casts doubt on its willingness to enforce its own professional standards. If action is delayed long enough, the ABA will be rendering a ruling in principle which, because of the delay, will have no effect on the case in point.

6. I recognize that as an attorney you have professional obligations, and that you wish to defer action until the ABA has issued "formal guidance." However, the ultimate responsibility of any General Counsel of the Navy is to the United States Government and not to the Bar Association. Others in the Navy also have responsibilities which are impacted by the failure to resolve this issue promptly. Since the ABA has ignored your requests for an opinion, I would think you would welcome assistance from others such as myself rather than discouraging it.

7. While the ABA procrastinates, the Government's rights are being compromised. Action is needed now. Therefore I reiterate my recommendation in reference (a) that, pending receipt of the ABA's response, you should suspend all dealings between the Navy and any law firm on matters in which a member of the law firm previously represented the Government or is disqualified from representing the contractor under any statute or regulation. In that way the Navy's position will not continue to be compromised while awaiting the ABA's ruling.

H. G. Rickover

Copy to:
Assistant Secretary of the Navy
(Installations and Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
1 DEC 1975

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY

Subj: Disqualification of law firms from representing companies on claims on which their attorneys originally represented the Government

Ref: (a) My memo to General Counsel, Department of Defense dtd 24 Jan 1975
(b) Your ltr to ABA dtd 8 Apr 1975
(c) Mr. Van Dusen's ltr to you dtd Nov 24, 1975

1. In reference (a) I raised the issue of the law firm of Sellers, Connor, and Cuneo continuing to represent shipbuilders on claims against the Navy after a Navy lawyer who had worked on these claims, or been responsible for them, had joined the firm. This appeared to be in violation of the American Bar Association's (ABA) Canons of Ethics.

2. Upon learning of this concern, Sellers, Connor, and Cuneo sought to justify its continued representation of those clients. One of its points was that the Office of General Counsel, Navy (OGC) had hired attorneys who formerly worked for General Dynamics, and other OGC lawyers continued to litigate those claims. You took action to neutralize that argument of Navy impropriety by disqualifying all Navy OGC lawyers in those General Dynamics cases. Thereafter, on 8 April 1975, by reference (b), you wrote to the American Bar Association's Committee on Professional Ethics asking if OGC should continue to deal with Sellers, Connor, and Cuneo on the claims in question since you were concerned that the law firm might be acting in contravention of the standards of professional conduct. We have both been concerned about the length of time which has elapsed since then and that the firm has continued to represent those clients, to the possible detriment of the Navy.

3. After more than 7 months delay, the ABA has finally rendered its decision, reference (c). In summary, the ABA ruling is that:

> "...whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question."

4. A waiver in the case of Sellers, Connor, and Cuneo would not appear appropriate because:

a. The attorney involved was a key member of the Navy's legal staff for shipbuilding claims, and was directly responsible for and involved with the Navy's legal position. He has an intimate knowledge of the Navy's facts, witnesses and of the strengths and weaknesses of the Government's cases. This is therefore a situation in which the lawyer was involved in a major way.

b. The firm of Sellers, Connor, and Cuneo is a relatively small one, with its attorneys necessarily having many internal contacts each day. In this respect it is quite different from the United States v. Standard Oil Company case cited in the ABA's opinion. In the Standard Oil case, the lawyer in question was isolated in the Paris office of the law firm, geographically separated from the New York lawyers who were working on the case.

c. The appearance of impropriety is strong because of the former Deputy Counsel's key position in the Navy. For this reason alone the Navy should not grant a waiver.

5. Since the ABA's answer lends substance to your earlier concern that continued representation by Sellers, Connor, and Cuneo in certain cases violates the ABA's Canons of Ethics, it appears the last impediment to action in this case has been removed. I would appreciate being informed of your final disposition of this matter.

H. G. Rickover

Copy to:
Assistant Secretary of the Navy
(Installations and Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

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DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

14 FEB 1976

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY

Subj: Disqualification of law firms from representing companies on claims on which their attorneys originally represented the government

Ref:
(a) My memorandum dtd 24 Jan 75 for the General Counsel of the Department of Defense
(b) Ltr dtd 18 Mar 75 from Mr. Niederlehner, OGC, Defense to Committee on Professional Ethics, ABA
(c) Ltr dtd 18 Mar 75 from Mr. Niederlehner, OGC, Defense to Asst. Attorney General, Justice
(d) Your ltr dtd 8 Apr 75 to Committee on Professional Ethics, ABA
(e) My Memo to you dtd 1 Dec 75
(f) Your Memo to me dtd 3 Dec 75

1. Over a year ago, in reference (a), I wrote the General Counsel of the Department of Defense (DOD) pointing out the law firm of Sellers, Connor and Cuneo had hired a former Office of General Counsel, Navy, attorney who had been the Deputy Counsel in charge of claims for the Naval Ship Systems Command (now the Naval Sea Systems Command). Sellers, Connor and Cunéo is representing shipbuilders in claims against the Navy valued by the contractors in the hundreds of millions of dollars. The former Deputy Counsel for Claims was in charge of the Government's defense of many of these claims. I pointed out that under the American Bar Association's Canons of Ethics, the law firm should withdraw from cases in which the former Deputy Counsel had responsibility on behalf of the Government.

2. Two months later, on 18 March 1975, the DOD General Counsel sought the advice of the American Bar Association (ABA) and the Department of Justice, references (b) and (c). So far as I can learn, the Department of Justice has never replied to reference (c). Moreover, there was apparently some problem with the DOD submission to the ABA because on 8 April 1975, you resubmitted the issue to the ABA's Committee on Professional Ethics and requested the ABA's advice. In that letter, reference (d), you stated that the law firm, "...may be acting in contravention of the standards of professional conduct...".

You also disqualified the Navy's Office of General Counsel from a case where the Navy had hired two lawyers who had formerly worked for the contractor involved. This action was taken after Sellers, Connor and Cuneo pointed out that the Navy had not withdrawn from cases in which their attorneys had been formerly employed by the contractor.

3. Seven months later--after numerous follow-ups, including a letter from me to the President of the ABA--the ABA's Standing Committee on Ethics and Professional Responsibility finally rendered its decision. The decision would require that the law firm be disqualified, unless the government waives the disqualification.

4. In reference (e), I explained to you the reasons why I believe the Government should not grant a waiver to Sellers, Connor and Cuneo. In reference (f), you replied,"I shall carefully consider the views which you have expressed before final disposition of the Cuneo matter."

5. It has been over a year and a half since the former Deputy Counsel for Claims joined the law firm of Sellers, Connor and Cuneo giving rise to the need for that law firm to withdraw from cases in which the former Deputy Counsel was involved. It has been over a year since I learned that the ABA's own Code of Professional Ethics required the firm to withdraw from such cases, and reported that fact to the DOD General Counsel. Two months have elapsed since the ABA rendered its long delayed opinion. Yet the law firm continues to act as though the ABA decision had never been rendered and the Navy continues to do business as usual with the firm.

6. Before the ABA rendered its opinion, you declined to take action on the basis that you had referred the matter to the ABA; you stated "I intend to be guided by the appropriate authorities of my profession on a professional matter." You assured me however, that you were "alive to the vital issues involved." Now that the ABA has issued its formal guidance, the onus is on the Navy to act promptly. It has not done so. Further delay will create the impression that the Navy is stalling until the cases in question have been resolved.

7. I would appreciate being informed when you will decide whether Sellers, Connor and Cuneo will be allowed to continue to represent shipbuilders on the claims where one of its members formerly had responsibility for the Government on those same cases.

H.G. Rickover

Copy to:
Assistant Secretary of the Navy
(Installations & Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
20 Feb 1976

MEMORANDUM FOR THE GENERAL COUNSEL, DEPARTMENT OF THE NAVY

Subj: Disqualification of law firms from representing companies on claims on which their attorneys originally represented the Government

Ref: (a) My memo to you dtd 14 Feb 1976
(b) My memo to you dtd 1 Dec 1975

Encl: (1) Copy of Business Week February 23, 1976 story entitled "The Ethics Squeeze on Ex-Government Lawyers"

1. In reference (a) I pointed out the need for you to decide promptly whether Sellers, Connor and Cuneo will be allowed to continue to represent shipbuilders on the claims where one of its members formerly had responsibility for the Government on those same cases. The attached article from the February 23, 1976 issue of Business Week (enclosure (1)) refers to the American Bar Association (ABA) ruling that pertains to this case. I want to be sure you have seen it.

2. The article states that the ABA initially said "no" to continued representation by that law firm. However, according to the article, several prominent Washington law firms and government agencies, including the Department of Justice, joined in protest. As a result, the ABA ruling now includes provisions whereby the Government may elect to waive disqualification of law firms such as Sellers, Connor and Cuneo.

3. As I have already explained in reference (b), it would be inappropriate to waive disqualification in the case of Sellers, Connor and Cuneo. If a firm is not disqualified under these circumstances, then no firm would ever be disqualified and the ABA's Code of Professional Conduct would be meaningless.

4. As requested in reference (a), I would appreciate being informed when you will decide this matter.

H. G. Rickover

Copy to:
Assistant Secretary of the Navy
(Installations and Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

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LEGAL AFFAIRS

The ethics squeeze on ex-government lawyers

Lawyers hold a high proportion of the top jobs in the federal government. And when those lawyers leave government service, a lot of them naturally gravitate to the Washington law firms that specialize in representing clients before their former agencies. The result is a chronic ethical dilemma that has bedeviled generations of Washington attorneys.

Now the new concern for professional ethics may transfer the problem to the law firms themselves, forcing a major change in the relationship between large corporations and their blue-chip counsel. A stringent reading by the District of Columbia Bar of its ethical code could compel law firms to sever relationships with corporate clients—some of long standing—right in the middle of a case. On a complicated matter, such as a major antitrust case, it could take a new firm at least a year to work into the litigation.

The problem arises out of the complicated skein of law, executive orders, and individual agency rules that define just how far former civil servants can go in representing private interests before their former agencies.

The general rule prohibits former federal employees from ever appearing before their former agency in a matter in which they "personally and substantially" participated and requires them to wait one year before appearing in connection with any other matter under their general supervision pending while they were in office. Several federal agencies are even tougher. The Consumer Product Safety Commission, for example, has a flat ban on any former employee going to work in any capacity for any maker of consumer goods for one year. Beyond government rules, courts and agencies usually require lawyers to follow the American Bar Assn.'s code of ethics.

Hard hit. Two years ago the ABA forbade all members of a law firm to handle a matter that any of their colleagues at the firm was ethically prohibited from working on. The bar association had private conflicts of interest in mind and did not give much thought to the impact on former government lawyers.

For a firm such as Covington & Burling in Washington, with a roster that includes former antitrust chief Edwin M. Zimmerman, former Treasury Under Secretary Edwin S. Cohen, and former Food & Drug Administration general counsel Peter B. Hutt, the rule had the potential for disaster. "I guess it's a problem all the time in Washington," says Lewis Van Dusen, chairman of the ABA ethics committee.

Ethics committee Chairman Freedman: The D. C. code will have national impact.

But other firms were also worried. In firms such as New York labor law specialists Vedder, Price, Kaufman, Kammholz & Day, the rule might have jeopardized 200 to 300 matters.

The issue came to a head last year when the Defense Dept. asked Van Dusen's committee whether a firm including a former Navy Dept. official could handle a contract dispute with that service. Interpreting the rule literally at first, the committee said no. But another prominent Washington firm, Wilmer, Cutler & Pickering, joined in protest with Covington & Burling and such government allies as the Internal Revenue Service, the Securities & Exchange Commission, and particularly Antonin Scalia, head of the Justice Dept.'s Office of Legal Counsel. "We, with the support of Mr. Scalia, were able to persuade the committee," says Lloyd N. Cutler coolly.

The D. C. bar's current draft opinion takes the tough position the ABA rejected

Their argument is that since a party to a lawsuit may always waive other disqualifications of an opposing attorney, the law firm itself ought to be permitted to take a case that it would otherwise be barred from taking as long as the government does not object. Although it has yet to publish its formal opinion on the question, the ABA is going along with this consent concept. However, the individual lawyer must not discuss it with other partners or share in the profits generated.

Just last month the U. S. Court of Appeals in San Francisco went even further than Cutler when opposing attorneys tried to disqualify a lawyer because of his former private law firm work. The lawyer now works for a Salt Lake City firm representing gasoline dealers in a broad-based antitrust class action against major oil companies. Exxon Corp. and Shell Oil Co., two of the defendants, tried to remove the entire firm from the case, arguing that the lawyer had previously performed legal work for each of them. The appeals judges agreed that the individual lawyer could be kept off the case but refused to disqualify the firm.

Another try. The ABA's apparent change of heart does not end the lawyers' problem, however, because the District of Columbia bar is about to publish its own ethical ruling on the same question. In its current draft, it takes the tough position that the ABA rejected. Advocates of a softer position are lobbying the local committee, which will consider the question later this month.

"I don't know how we will come out," says committee chairman Monroe H. Freedman, formerly a law professor at George Washington University and now dean of the Hofstra Law School. But unlike the ABA's original ruling, the current D. C. bar opinion was made intentionally, with the plight of former government lawyers firmly in mind. If the Washington bar does maintain its ground, the rule would have national impact because it might cover appearances by out-of-town lawyers.

Settling the law firms' problems will not help to clarify the currently haphazard federal conflict-of-interest rules. But clearer guidelines may be on the way. The Ford White House may use a Congressional committee's data to revise rules last promulgated by President Johnson. The investigations subcommittee of the House Commerce Committee has asked nine regulatory agencies where their commissioners worked before and after their government jobs and is now compiling results of a survey sent to 500 former high officials. The goal: to pinpoint the extent of the "revolving door" problem. ■

BEST
AVAILABLE COPY

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

20 Feb 1976

Edward H. Levi
Attorney General
Department of Justice
Constitution Avenue and Tenth Street N.W.
Washington, D.C. 20530

Dear Mr. Levi:

During our discussion on November 24, 1975, I explained how a Department of Justice ruling, which reversed a prior interpretation rendered by that Department, has stopped the Navy from hiring outside counsel to assist in handling shipbuilding claims.

In that same vein, I thought you might be interested in the attached article which appeared in the February 23, 1976 issue of Business Week. The Defense Department case referred to in the article also involves shipbuilding claims. The former Deputy Counsel for Claims in the Naval Sea Systems Command was hired by a Washington claims firm, Sellers, Connor and Cuneo. Yet, contrary to the American Bar Association's (ABA) Code of Professional Ethics, the company is continuing to represent clients in cases for which the former Deputy Counsel was previously responsible.

It took 7 months to obtain a decision from the ABA. Not until I read the Business Week article did I have any inkling that the delay involved behind-the-scenes activity by Washington law firms and Government agencies. Nor, was I aware of the role apparently played by the Justice Department. If the article is correct, it goes a long way toward explaining why the ABA ruling contains provisions which enable Government agencies to waive disqualification.

Nearly 3 months have elapsed since the ABA issued its ruling and the firm continues to represent its clients in the cases in question. No doubt efforts are underway to get the Navy to waive disqualification on the basis of the ABA ruling.

At present the cards are stacked heavily against the Government's ability to defend itself against unwarranted claims. I would appreciate any assistance you could give in these matters.

Respectfully,

H. G. Rickover

Internal Navy Distribution:
Secretary of the Navy
Assistant Secretary of the Navy
(Installations and Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

26 Feb 1976

Mr. Lawrence E. Walsh, President
American Bar Association
One Chase Manhattan Plaza
New York, New York 10005

Dear Mr. Walsh:

On November 4, 1975, I solicited your help in expediting an American Bar Association (ABA) ruling on a case involving a Washington law firm which continues to represent clients against the Navy in apparent violation of the ABA's Code of Professional Ethics. At that time the ABA had been considering the question for approximately seven months. On November 24, 1975, Mr. Van Dusen, Chairman of the ABA Ethics Committee mailed me a copy of Formal Opinion 342, the ABA ruling on this case.

Instead of being an opinion in the specific case, Formal Opinion 342 is a broad ruling which can be interpreted either as requiring disqualification of this law firm, or as encouraging waiver of the disqualification, depending on your viewpoint. I believe Formal Opinion 342 weakens the disqualification provision of the Code of Professional Ethics. I predict that Government attorneys, concerned about future employment opportunities, will start interpreting Formal Opinion 342 as justifying widespread waivers.

The enclosed article from the February 23, 1976 issue of Business Week entitled "The Ethics Squeeze on Ex-Government Lawyers," discusses the background of Formal Opinion 342. The article states that the ABA initially said "no" to continued representation by the law firm. However, according to the article, several large Washington law firms, Government agencies, and even an Assistant Attorney General protested. The article implies that as a result of this protest the ABA ruling was changed to provide that the Government may waive disqualification in such cases.

The ABA's handling of this case brings into question the operation of its ethics committee. As I am sure you are interested in safeguarding your organization's standing among the public, I suggest that you consider taking the following actions:

a. The ABA should develop the capability to respond promptly to requests for opinions. It took the ABA nearly eight months to issue this opinion, during which time the law firm in question continued to represent clients in cases where the language of the Code of Professional Ethics indicates the firm should have been disqualified. This delay may be enough to render the ABA ruling meaningless in this specific case. The adage "Justice delayed is justice denied" is apropos.

b. When requested, the ABA should render opinions in specific cases, and then supplement these opinions if necessary with general rulings. In my view, the ABA's decision to give the Navy only a general response resulted in no useful guidance in the case in question. After nearly eight months delay, the ABA merely shifted the problem back to the Navy.

c. When deliberating matters involving the public interest, the ABA should either prohibit involvement by persons outside of the decision-making group altogether, or it should provide a forum whereby all interested parties can be heard. If the Business Week article is correct, it appears that persons with the opposing point of view did not have the same opportunity to influence the final decision as did the law firms and Government agencies mentioned.

I believe that the above suggestions, if adopted, would enhance public confidence in your organization and its Code of Professional Ethics. I would appreciate learning whether or not you plan to adopt them.

In connection with this matter, after reading the Business Week article, I tried to get a copy of ABA Informal Opinion 1336 (referenced in Mr. Van Dusen's November 24, 1975 letter to the Navy General Counsel) so I could compare it with Formal Opinion 342. To date, I have been unsuccessful. The Washington, D.C. office of the ABA said they did not have it and suggested calling the ABA Headquarters staff in Chicago. The ABA staff in Chicago stated that Informal Opinion 1336 is not available; that it is being redrafted into Formal Opinion 342 which will be issued shortly--notwithstanding the fact that I already have in my possession a copy of Formal Opinion 342 marked "FINAL" and dated "11/24/75."

I would appreciate your help in obtaining a copy of Informal Opinion 1336 and in confirming that the 11/24/75 "FINAL" version of Formal Opinion 342 is, in fact, the ABA's final opinion in this matter.

Sincerely,

H. G. Rickover

Encl:
As stated

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
4 June 1976

MEMORANDUM FOR THE GENERAL COUNSEL OF THE NAVY

Subj: Disqualification of law firms from representing companies on claims on which their attorneys originally represented the Government

Ref: (a) My memo to you dtd 14 Feb 1976
(b) Your memo for the Under Secretary of the Navy dtd 2 Mar 1976

Encl: (1) Copy of story from New York Times of June 3, 1976 headlined "U.S. Judge Bars the Law Firm of an Ex-Federal Aide From Case"

1. In prior memoranda and most recently by reference (a), I have written you concerning the law firm of Sellers, Connor and Cuneo which hired a former Office of General Counsel, Navy attorney who had been the Deputy Counsel in charge of claims for the Naval Ship Systems Command (now the Naval Sea Systems Command). Sellers, Connor and Cuneo is representing shipbuilders in claims against the Navy valued by the contractors in the hundreds of millions of dollars. The former Deputy Counsel for Claims was in charge of the Government's defense of many of these claims.

2. You referred this case to the American Bar Association which ultimately responded with Formal Opinion 342 of November 24, 1975 setting forth guidelines for disqualification of counsel. Thereafter, in reference (b) you concluded that no action was required. As a result, the Sellers, Connor, and Cuneo firm continues to represent shipbuilding interests in cases against the Navy which were under the cognizance of the former Deputy Counsel when he was with the Navy.

3. A story in the New York Times on Thursday, June 3, 1976, reports that, at the request of the Civil Division of the Department of Justice, Judge Schwartz of the Court of Claims has rendered a decision disqualifying a law firm from handling an $800,000 claim against the Department of Housing and Urban Development (HUD). According to the article, the law firm

of Krooth and Altman had hired Mr. A. M. Prothro, who had been General Counsel of HUD during most of the time when the actions leading to the claim had occurred. Mr. Prothro and the law firm submitted affidavits stating that Mr. Prothro had not taken part in pursuing the action against HUD nor had he received any fees in connection with the case. The story also reports that Mr. Prothro as General Counsel of HUD had been involved only "peripherally" in the specific case. Nevertheless, Judge Schwartz disqualified the law firm pointing out that "no man can serve two masters."

4. Judging from the press account, the facts in the Krooth and Altman case appear to be similar to the facts in the Sellers, Connor and Cuneo case. Certainly the principle is the same. However, in the Krooth and Altman case, Judge Schwartz seems to have arrived at the opposite conclusion that you reached in the Sellers, Connor and Cuneo case. I believe his decision makes more sense. Accordingly, I recommend you review your conclusion contained in reference (b) in the light of Krooth and Altman.

5. I would appreciate being informed of the action you take in this matter.

H. G. Rickover

Distribution:
General Counsel, DOD
Assistant Secretary of the Navy
(Installations and Logistics)
Chief of Naval Material
Commander, Naval Sea Systems Command

U.S. Judge Bars the Law Firm of an Ex-Federal Aide From Case

By DAVID BURNHAM

Special to The New York Times

WASHINGTON, June 2—In a rare decision, a Federal judge has disqualified a Washington law firm from handling an $800,000 claim against the Government because one of the firm's partners formerly was involved in the case as a lawyer for the Government.

The decision, now being appealed, could have considerable impact on the operation of Washington's powerful law firms, many of which make a point of seeking partners who have Government experience regulating the economic areas in which the law firms specialize.

The decision by Judge David Schwartz of the United States Court of Claims to disqualify the law firm appears to conflict directly, with a decision announced last week by the Federal Communications Commission about its former chairman, Dean Burch.

In the F.C.C. case, the commission unanimously rejected a request that Mr. Burch's law firm, Pierson, Ball & Dowd, be disqualified from representing RKO General Inc. in a proceeding concerning television Channel 7 in Boston because Mr. Burch had been substantially involved in the early stages of the matter while commission chairman.

The decision by Judge Schwartz to disqualify the law firm of Krooth & Altman from handling an $800,000 claim against the Department of Housing and Urban Development was made at the request of the civil division of the Justice Department.

Under the rules of the Court of Claims, a decision of one of that court's 15 trial judges may be reviewed by the full seven-man Court of Claims at the request of the plaintiffs, in this case the law firm of Krooth & Altman. A request for review has been filed.

Quoting the biblical principle that "no man can serve two masters," Judge Schwartz ruled that the firm should be disqualified under the American Bar Association's code of professional responsibility because one partner, A. M. Prothro, had been general counsel of H.U.D. and the agency that preceded it, during most of the time when actions leading to the claim had occurred.

The judge ordered the disqualification even though Mr. Prothro and the law firm's other partners submitted affidavits stating that Mr. Prothro had not taken part in pursuing the action against H.U.D. or received any fees in connection with the case.

In turn, Judge Schwartz, in his 46-page opinion, cited an A.B.A. requirement that lawyers must avoid "the appearance of impropriety even if none exists."

If upheld on review, the decision could have considerable impact on the way law is practiced before the Federal agencies that play such an important role in the nation's economy. The impact, however, is expected to be somewhat more limited.

One reason the decision may be less sweeping than it appears is that Federal law limits the application of the restrictions of the conflict-of-interest laws to situations involving "any judicial of other proceeding, application, request for a ruling or other determination, contract claim, controversy, charge, accusation, arrest or other particular matter."

Though this listing appears quite broad, a recent opinion of the bar group's committee on professional ethics said that it did not apply to the private lawyer who in his earlier Government career was drafting, enforcing or interpreting Government procedures, regulations or laws.

This would mean that a top official probably could be intimately involved in developing a broad Federal rule affecting a major industry, leave Government and begin raising legal challenges to the rule for the industry without violating either existing Federal law or the A.B.A.'s conflict-of-interest rules.

A second reason the impact of the decision may be somewhat limited is that the situation that prompted the Justice Department to ask for disqualification is quite rare.

In this case, two New Jersey lawyers, George and Martin Kesselhaut, asked Mr. Prothro and the law firm of Krooth and Altman to help them obtain the $800,000 they say is owed them by H.U.D. Mr. Prothro as general counsel of H.U.D., approved the program under which the claim of the two Kesselhauts arose and also was peripherally involved in the specific case.

The situation is thus one in which the Justice Department is trying to protect the United States Government from losing money and does not involve a situation in which the broad public interest may be damaged.

Judge Schwartz's unusual decision was taken under the authority of the A.B.A.'s code of professional responsibility. Some of the guidelines in the code are also stated in the criminal Code of the United States.

In response to an inquiry from Senator William Proxmire, Democrat of Wisconsin, however, the Justice Department determined that only six individuals had been prosecuted under the particular conflict-of-interest section of the criminal law in the last 10 years. The Justice Department said 40 recommendations for such prosecution had been made to it by other Federal agencies during the decade.

The case in which the Federal Communications Commission did not disqualify the law firm of its former chairman, Mr. Burch, apeared similar to the case where Judge Schwartz decided disqualification was required.

The commission said Mr. Burch was personally and substantially involved in the early stages of the RKO General case. But it denied the petition of the challenging group, Community Broadcasting of Boston Inc., because Mr. Burch had submitted sworn statements that he had been screened from the case while a private lawyer.

Terry F. Lenzner, the lawyer representing the challenging case, said he did not know whether the F.C.C. decision was appealed because though the commission announced its decision on May 24 he still had not received the formal opinion.

CITY COUNCIL PANEL FAILS TO GET QUORUM

The Rules, Privileges and Elections Committee of the New York City Council met briefly yesterday to consider 16 rule changes, but adjourned without acting after it could not get a quorum. Seven members of the 35-member committee gathered at 250 Broadway at 10 A.M., ready to act on the rule changes.

With eight members needed for a quorum, the seven in attendance waited in vain until 10:30 A.M. for at least one more member to appear. The chairman, Edward V. Curry, Democratic Councilman at Large from Staten Island, adjourned the session.

In addition to Mr. Curry, those who attended were the majority leader, Thomas J. Cuite, Democrat of Brooklyn; Edward L. Sadowsky and Matthew J. Troy Jr., both Democrats of Queens, Wilfred Gordon and Mary Pinkett, Democrats of Brooklyn, and Theodore S. Weiss, Democrat of Manhattan.

Absent were Arthur J. Katzman and Morton Povman, both Democrats of Queens; Theodore Silverman and Angelo J. Arcuri, Democrat and Republican, respectively, of Brooklyn, and Michael DeMarco, Democrat of the Bronx.

Aileen B. Ryan, Democrat of the Bronx, had previously been excused from the meeting, and Frank J. Biondolillo, Republican Councilman at Large from Staten Island, was ill.

Fireman Killed in Crash

KNOXVILLE, Tenn., June 2 (AP)—Two fire trucks responding to a false alarm collided at an intersection here, killing one fireman and injuring six others. Fireman Joe E. Tarwater, 37 years old, died after he was catapulted through a fire truck windshield yesterday, said Clyde Parker, a deputy fire chief.

TREES, LAKES, GREEN GRASS
THE FRESH AIR FUND

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DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
19 January 1979

MEMORANDUM FOR THE SECRETARY OF THE NAVY

Subj: Recommendation to disqualify the law firm of Sellers, Connor and Cuneo from representing companies in cases presently pending before the Armed Services Board of Contract Appeals

Ref: (a) My memo dtd 24 Jan 1975 for the General Counsel of the Dept of Defense
(b) Navy Office of General Counsel ltr dtd 8 Apr 1975 to Committee on Professional Ethics, American Bar Assn
(c) My memo dtd 14 Feb 1976 for the General Counsel, Dept of the Navy

Encl: (1) Copies of references (a) through (c)

1. On December 18, 1978, the Washington Post reported that Mr. Richard Solibakke, the Chairman of the Armed Services Board of Contract Appeals, (the Board, or ASBCA) will be resigning to accept a position with the law firm of Sellers, Connor and Cuneo, which is representing contractors in numerous cases now pending before the Board. This situation results in a potential conflict of interest which would appear to violate the lawyers' Code of Professional Responsibility.

2. The American Bar Association (ABA) through its Code of Professional Responsibility has established rules which, on their face, would preclude Sellers, Connor and Cuneo from further participation in cases now pending before the Board, if Mr. Solibakke joins the firm. The disciplinary rules prohibit a lawyer who leaves public office from accepting private employment in a matter in which he had substantial responsibility prior to his leaving public office. Further, the rules provide that if an attorney must refuse employment under a Code disciplinary rule, no partner or associate may accept or continue such employment.

3. As Chairman of the Armed Services Board of Contract Appeals, Mr. Solibakke has been responsible for all cases before the Board during his tenure. Under the ABA rules, he appears to be ineligible to represent any client in any case which was pending before the Board during the time he was Chairman.

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Consequently, any attorney in the law firm Mr. Solibakke joins would also be prohibited from continuing cases from which Mr. Solibakke would be barred. The applicable ABA rules are:

a. Ethical Consideration 9-3 states:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

b. Disciplinary Rule 9-101(B) which implements Ethical Consideration 9-3, states:

> "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

c. Disciplinary Rule 5-105(D) states:

> "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

I understand the above rules govern District of Columbia lawyers such as Sellers, Connor and Cuneo.

4. This is not the first time the Sellers, Connor and Cuneo law firm has hired a Government lawyer under circumstances which created a conflict of interest situation. For example, in 1974, the firm, while prosecuting hundreds of millions of dollars in shipbuilding claims against the Navy, hired the Naval Sea Systems Command's (NAVSEA) Deputy Counsel in charge of shipbuilding claims. Sellers, Connor and Cuneo did not, however, withdraw from any of those active shipbuilding claims.

5. In reference (a) I brought that issue to the attention of the General Counsel of the Defense Department. Sellers, Connor and Cuneo protested that the Navy General Counsel and the Counsel, NAVSEA had given approval to the hiring of the Deputy Counsel. The basis of Mr. Cuneo's argument was that the Navy officials raised no objection after being informed of the hiring, and that they had given the Deputy Counsel letters of approbation upon his resignation.

6. The Navy Office of General Counsel denied giving approval, but did not enforce the disqualification. Instead, in reference (b), the Navy General Counsel referred the matter to the American Bar Association, asking whether the ABA rules cited in paragraph 3 above would disqualify Sellers, Connor and Cuneo from shipbuilding claims formerly under the cognizance of the Deputy Counsel whom they hired.

7. Months passed without an answer from the ABA, despite my repeated follow-ups with the Navy General Counsel and eventually with the President of the ABA. Finally, on November 24, 1975--some 7 months after the Navy first raised the issue--the American Bar Association issued Formal Opinion 342 in response to the Navy request.

8. While reaffirming the concept that a firm may not accept or continue business which one of its members must decline, and stressing the importance of avoiding even "the appearance of impropriety," the ABA opinion included a loophole which provided for waiver of disqualification as follows:

> "...whenever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interest of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and providing the firm also makes its own independent determinations as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question."

I later discovered, in a Business Week article, that the loophole resulted from some behind-the-scenes work by several large firms and an appointed senior official in the Justice Department.

9. During the more than 7 months it took the ABA to answer the Navy's request, Sellers, Connor and Cuneo continued to represent shipbuilders in the claims in question. Two months after receipt of the ABA opinion, the Navy General Counsel still had not taken action against the firm. I urged in reference (c) that the Navy General Counsel act promptly in this matter and thereby avoid the impression that the Navy was stalling until the cases in question were resolved.

10. The Navy never did take action to enforce the Sellers, Connor and Cuneo disqualification, nor did it grant a waiver. Three months after the ABA finally issued its opinion, the Navy General Counsel concluded that no waiver or other action was necessary because in the interim the principal cases involving the former Deputy Counsel had been settled. Although I had repeatedly recommended that the Defense Department issue policy directives to prevent future incidents of this sort, it has to date failed to do so.

11. I do not know Mr. Solibakke. Nor do I question his right to accept employment in private practice; there are many law firms which are not involved with ASBCA cases and with whom he can seek employment without involving any appearance of conflict of interest. Consistent with the ABA's Code, however, the law firm that employs him should refrain from further representation in cases which were before the ASBCA while Mr. Solibakke was chairman.

12. Regardless of the actual motivations, the hiring of Mr. Solibakke by Sellers, Connor and Cuneo appears designed to give that firm an advantage with the Board--to enable the firm to exploit his knowledge of and rapport with administrative judges; his knowledge of the informal, internal workings of the Board; his knowledge of its strengths and weaknesses.

13. To avoid the appearance of impropriety and to foster the proper conduct of Government business, we cannot tolerate situations where the law firms and contractors are potential employers of the very government lawyers and administrative judges with whom they deal.

14. The Solibakke issue tests whether the ABA's Code of Professional Responsibility is a legitimate effort to avoid conflict of interest situations or is simply a public relations document. It will test whether the Department of Defense and the ABA will enforce the ABA's Code.

15. Based on the above, I recommend that you promptly warn the Sellers, Connor and Cuneo law firm of the potential conflict of interest that would be involved in the hiring of Mr. Solibakke unless the firm withdraws from all its current ASBCA cases. If Sellers, Connor and Cuneo is not warned, the firm may later claim, as it did once before, that the Government has tacitly waived the firm's disqualification because the Government knew of the impending hiring but took no action.

16. If Mr. Solibakke joins Sellers, Connor and Cuneo and the firm does not withdraw from ASBCA cases in which he could not accept employment, I recommend you take formal actions with the American Bar Association and the District of Columbia Bar.

17. Since this matter involves other elements of the Defense Department, I am sending a copy of this memorandum to the Deputy Secretary of Defense, and to the General Counsel of the Office of the Secretary of Defense, the Defense Logistics Agency, and the other military services for whatever action they deem appropriate.

18. I would appreciate being informed of the action you take in this matter.

H. G. Rickover

Copy to:
Deputy Secretary of Defense
General Counsel, Office of the Secretary of Defense
General Counsel, Army
General Counsel, Air Force
General Counsel, Defense Logistics Agency
Assistant Secretary of the Navy (Installations and Logistics)
Chief of Naval Operations
Chief of Naval Material
Commander, Naval Sea Systems Command

THE SECRETARY OF THE NAVY
WASHINGTON, D. C. 20350

February 6,1979

MEMORANDUM FOR ADMIRAL H. G. RICKOVER, USN

Subj: Recommendation to disqualify the law firm of Sellers, Connor and Cuneo from representing companies in cases presently pending before the Armed Services Board of Contract Appeals

Your memorandum of January 19, 1979, concerning the recent association of the former Chairman of the Armed Services Board of Contract Appeals with the law firm of Sellers, Connor and Cuneo raises questions which may affect other defense Components and thus should, in my view, be resolved with appropriate Department of Defense coordination.

I have accordingly referred this to the Deputy Secretary of Defense and will be working with him and the DOD General Counsel on the matter.

W. Graham Claytor

W. Graham Claytor, Jr.

Encl.

92-783 O - 82 - 5

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

February 6, 1979

MEMORANDUM FOR THE DEPUTY SECRETARY OF DEFENSE

Subj: Admiral Rickover's Recommendation to Disqualify the law firm of Sellers, Connor and Cuneo -- ACTION MEMORANDUM

Admiral Rickover's memorandum to me of January 19, 1979, a copy of which he furnished to you, commented on a recent press report that Mr. Richard Solibakke would be resigning as Chairman of the Armed Services Board of Contract Appeals to accept a position with the law firm of Sellers, Connor and Cuneo. I understand that Mr. Solibakke's resignation from the Board became effective on January 31, and that he has commenced his association with the Sellers firm. We have now had an opportunity to look into the extent of this matter's potential effect upon the Navy.

We have identified thirteen Navy cases pending before the Board and one pending before the United States Court of Claims in which the Sellers firm represents the claimants. We have no first-hand knowledge of the degree of Mr. Solibakke's personal participation and substantial responsibility, if any, in the thirteen cases before the Board. In the case pending before the Court, however, his responsibility appears to be substantial, because he signed the Board's decision as a participating judge.

Mr. Solibakke's responsibility for the case now pending before the Court and the possibility that he may likewise have participated in one or more of those pending before the Board raise serious questions as to the consequences which could arise from his association with the Sellers firm. That is so because of three provisions in the Code of Professional Responsibility of the District of Columbia Bar which are applicable to the Sellers law firm, a District of Columbia firm. They are as follows:

Ethical Consideration 9-3

> After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

Disciplinary Rule 9-101(B)

A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

Disciplinary Rule 5-105(D)

If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

This situation, therefore, raises a question as to the ability of the Sellers firm to continue its representation of claimants in a number of Navy cases. Unless some coordinated DOD action is taken the Navy may be placed in a position of moving to disqualify the Sellers firm on a case-by-case basis. Because other Department of Defense components may have cases similarly affected, it would appear desirable to ascertain the facts with respect to all of them. I believe it would be useful to assess and resolve the situation from the standpoint of its total potential effect on Department of Defense litigation. Any governmental action found necessary could then be appropriately coordinated.

The General Counsel of the Navy has been requested to cooperate fully with your office in this matter.

W. Graham Claytor

W. Graham Claytor, Jr.
Secretary of the Navy

Copy to:
DOD General Counsel

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
25 January 1979

MEMORANDUM FOR THE SECRETARY OF THE NAVY

Subj: Post-employment restrictions on Government personnel - The Ethics in Government Act of 1978

Ref: (a) Director, Office of Government Ethics memorandum dated 17 January 1979; same subject
(b) My memorandum to you dated January 19, 1979; Subj: Recommendation to disqualify the law firm of Sellers, Connor and Cuneo from representing companies in cases presently pending before the Armed Services Board of Contract Appeals

1. Reference (a) requested that Heads of Departments, Independent Agencies and Government Corporations submit by January 26, 1979, specific problems which should be treated or accommodated by regulations which the Office of Government Ethics intends to propose in the near future. These regulations will give guidance on Title V of the Ethics in Government Act of 1978. The Office of the Chief of Naval Material transmitted reference (a) to the Naval Sea Systems Command on 24 January 1979, requesting comments by close of business 25 January 1979.

2. Reference (b) is the memorandum I recently sent you describing the potential problems growing from the apparent decision of Mr. Richard Solibakke to resign as Chairman of the Armed Services Board of Contract Appeals (ASBCA) to join the Sellers, Connor and Cuneo law firm which specializes in representing contractors before the ASBCA.

3. I recommend that you forward reference (b) to the Director, Office of Government Ethics so that his office can address this type of problem in drafting regulations. A copy of reference (b) is attached for your convenience.

4. I would appreciate being informed of what action you take in this matter.

H. G. Rickover

Copy to:
General Counsel, Navy
Chief of Naval Material
Commander, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
9 February 1979

Robert E. Jordan III, Chairman
District of Columbia Bar, Ethics Committee
Steptoe & Johnson
1250 Connecticut Avenue
Washington, DC 20036

Dear Mr. Jordan,

This is in further reply to your letter of December 11, 1978, concerning the ethics of a former Government lawyer soliciting claims business against his former client.

Enclosed is a copy of a letter from the American Bar Association in which they refer me to the District of Columbia Bar saying this matter is within your jurisdication.

The last time the Navy referred a question under the Code of Professional Responsibility to the American Bar Association it took seven months to get a decision. By the time that case was decided, so much time had elapsed that the issues were passe.

Four months have passed since I first forwarded the advertisement apparently soliciting claims business against a former client and the American Bar Association has now declined to give an opinion. The District of Columbia Bar, which the American Bar Association says is the responsible body, has not responded to the issues at all.

Shortly I expect to be testifying before several Congressional Committees, which in the past, have expressed interest in the question of Government lawyers swapping sides. Would it be possible for me to receive an opinion from your committee before the end of February?

Sincerely,

H. G. Rickover

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
8 March 1979

MEMORANDUM FOR THE DEPUTY SECRETARY OF DEFENSE

Subj: Recommendation to disqualify the law firm of Sellers, Connor and Cuneo from representing companies in cases presently pending before the Armed Services Board of Contract Appeals

Ref: (a) My memo dtd 19 January 1979 for the Secretary of the Navy
(b) SECNAV ltr dtd February 6, 1979 to me, same subject
(c) SECNAV memo dtd February 6, 1979 for you, subject: ADM Rickover's recommendation to disqualify the law firm of Sellers, Connor and Cuneo--Action Memorandum

1. In reference (a) I reported to the Secretary of the Navy that Mr. Richard Solibakke, then Chairman of the Armed Services Board of Contract Appeals (ASBCA) was reported in the press to be resigning to accept a position with the law firm of Sellers, Connor and Cuneo. I recommended that the Secretary promptly warn Sellers, Connor and Cuneo of the potential conflict of interest that would be involved in the hiring of Mr. Solibakke unless the firm withdrew from all its current ASBCA cases. I also recommended that if Mr. Solibakke joined the firm and the firm did not withdraw from ASBCA cases in which he could not accept employment, that formal action be taken with the American Bar Association and the District of Columbia Bar.

2. By reference (b) the Secretary of the Navy advised me that he was forwarding the issue to you since the questions raised in reference (a) affected other Defense components. I have heard nothing further with regard to my recommendation.

3. Mr. Solibakke has now joined Sellers, Connor and Cuneo as a partner, and the firm apparently has no intention of withdrawing from cases that were pending before the Solibakke Board. It seems clear that under the Code of Professional Responsibility of the American Bar Association (ABA) and under the rules applicable to District of Columbia law firms, the firm should be required to do so.

4. As I pointed out in reference (a), this is not the first time the firm of Sellers, Connor and Cuneo has refused to withdraw from a case against the Defense Department after hiring a Defense Department lawyer in a conflict of interest situation.

In 1974 the firm hired the Naval Sea Systems Command (NAVSEA) Deputy Counsel who was in charge of shipbuilding claims. This man was responsible for analyzing the shipbuilders' claims for the Government, advising the Navy claims team and preparing the Government's defense. He had an intimate knowledge of the Government's legal position, evidence and witnesses. Sellers, Connor and Cuneo represented shipbuilders in a number of these same claims, and by hiring the NAVSEA Deputy Counsel, they acquired inside information as to the Government's position. Under the ABA's Code of Professional Responsibility, the firm should have withdrawn from these claims. The Navy requested them to withdraw, but Sellers, Connor and Cuneo refused to do so, claiming they had done nothing wrong. The Defense Department sought the advice of the ABA, but took no direct action against the firm. Sellers, Connor and Cuneo continued to represent the shipbuilders. In 1976 when the Defense Department was finally prepared to act, these claims had all been settled thus making the issue academic.

5. In a letter dated February 28, 1979, the Sellers, Connor and Cuneo firm forwarded to the Navy interrogatories and requests for documents under ASBCA Case No. 21737--a major appeal by General Dynamics now pending before the Board. This case was also pending there when Mr. Solibakke was Chairman. In this letter Sellers, Connor and Cuneo requests documents under the cognizance of NAVSEA 08, my office. Considering the previous experience with this law firm, I believe it would be wrong for the Navy to act upon this request.

6. The prior history of this law firm coupled with the importance of the position of Chairman of the Armed Services Board of Contract Appeals makes this an important test of principle. Failure to require the company to withdraw in this case will make a mockery of the ABA's Code of Professional Ethics and the Defense Department's standards for conduct of public business. I understand that if this case were in Federal Court in the District of Columbia, Sellers, Connor and Cuneo could be forced to withdraw. I see no reason why the Defense Department should apply a lesser standard.

7. An early decision on the issues raised in reference (a) is needed; otherwise, Sellers, Connor and Cuneo will use the delay to embarrass the Government. I recommend, as I did in reference (a), that the Defense Department take formal action expeditiously with the American Bar Association and with the District of Columbia Bar against Sellers, Connor and Cuneo.

8. I would appreciate being informed of the action you take in this matter.

H. G. Rickover

Copy to:
General Counsel, Office of Secretary of Defense
Secretary of the Navy
Assistant Secretary of the Navy
(Manpower, Reserve Affairs and Logistics)
General Counsel of the Navy
General Counsel of the Air Force
General Counsel of the Army
General Counsel, Defense Logistics Agency
Chief of Naval Operations
Chief of Naval Material
Deputy General Counsel of the Navy for Litigation
Commander, Naval Sea Systems Command

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

April 12, 1979

MEMORANDUM FOR The General Counsel, Department of the Army
The General Counsel, Department of the Navy
The General Counsel, Department of the Air Force
Counsel, Defense Logistics Agency

SUBJECT: Representation by the law firm of Sellers, Conner & Cuneo in cases presently pending before the Armed Services Board of Contract Appeals

The Department of the Navy has requested advice with respect to any possible disqualification of the law firm of Sellers, Conner & Cuneo (the "Sellers firm") in cases pending before the Armed Services Board of Contract Appeals. The request for advice arises out of the action of the firm to make Richard C. Solibakke a member of the firm. Mr. Solibakke had served, prior to joining the firm, as Chairman of the Armed Services Board of Contract Appeals (the "Board"). We have examined the facts with respect to Mr. Solibakke's participation in cases now pending before the Board, the undertaking by the Sellers firm to screen Mr. Solibakke from participation in cases before the Board and any fees generated therefrom, and the law and rules of professional responsibility applicable to such disqualification. We have concluded that the Sellers firm is not disqualified from any case in which they are now engaged and should not be so disqualified in the future. Accordingly, on behalf of the Department of Defense, with respect to those cases listed on Attachment A, I hereby waive the disqualification of Sellers, Conner & Cuneo to the extent such disqualification may be required under Disciplinary Rule 5-105(D).

1. Facts

The facts with respect to Mr. Solibakke's participation in pending cases and the undertaking by the Sellers firm to screen Mr. Solibakke from such pending cases are set forth in affidavits attached hereto. The facts are summarized below.

a. Mr. Solibakke's participation in pending cases

Mr. Solibakke was a member of the Board from April 22, 1963

through January 31, 1979 and from April 22, 1968 through January 31, 1979 held the position of Chairman. On February 1, 1979, Mr. Solibakke joined the law firm of Sellers, Conner & Cuneo. At the time of Mr. Solibakke's resignation from the Board, the Sellers firm represented appellants in 30 cases (41 docket numbers) pending before the Board. Those cases are listed on Attachment A.

As Chairman, Mr. Solibakke normally participated in each decision issued by the Board. After a hearing before the Board member responsible for the case, the Board member prepares a draft opinion and circulates the opinion to the other two members of the panel to which the Board member is assigned, to one of the vice chairmen, and to the Chairman for review and concurrence or dissent. Mr. Solibakke would not normally become involved in any substantial manner in a pending case until a draft opinion was prepared requiring his approval. None of the cases pending at the time of Mr. Solibakke's resignation had reached that stage on the merits.1/

In addition to participating in each decision, Mr. Solibakke was responsible for ensuring that the Board's cases were decided in a timely manner. In the exercise of this responsibility, Mr. Solibakke was often required to make decisions of an administrative nature affecting individual cases. For example, Mr. Solibakke participated in procedural decisions such as rulings on motions questioning the Board's jurisdiction and in routine dismissals. He would regularly discuss the progress of cases with Board members to determine the reason for delays. On occasion it would be necessary for Mr. Solibakke to reassign cases to a different Board member. Occasionally Board members would informally discuss with Mr. Solibakke unusual factual details or novel legal

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1/ A decision in one case in which the Sellers firm represented the appellant, Appeal of Hayes International Corp., ASBCA Nos. 21758, 21759, 21972, was issued November 17, 1978 during the period that Mr. Solibakke was engaged in discussions with the firm concerning future employment. Mr. Solibakke did not participate in that decision.

theories of a particular case. Mr. Solibakke's review of Board records caused him to conclude that he had had some contact with three cases in which the Sellers firm served as counsel that were pending at the time of his resignation from the Board.2/ The acting Chairman of the Board reviewed each of the pending appeals set out in Attachment A with the Board member

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2/ The three cases that Mr. Solibakke concludes that he had some contact with are as follows:

Appeal of General Electric Company, ASBCA No. 20930. Prior to the hearing Mr. Solibakke discussed legal theories underlying the appellant's position with Mr. Andrews.

Appeal of James S. Lee & Co., ASBCA No. 18156. Mr. Solibakke helped make arrangements for a hearing to be held in Hong Kong. Mr. Solibakke discussed with Mr. Roe certain discovery problems, a request for postponement of a hearing, a request to hold a "split" hearing in more than one location, certain audit testimony, and legal theories underlying the appellant's position. Mr. Solibakke transferred the case to Mr. Vasiloff.

Appeal of Palmetto Enterprises, ASBCA No. 22839. Mr. Solibakke discussed threshhold legal issues concerning legal and jurisdictional problems with Ms. Burg.

responsible for the appeal and reported Mr. Solibakke's participation in six cases3/. There is no evidence of Mr. Solibakke's participation in any other pending case in which the Sellers firm serves as counsel.

3/ The six cases and the Board members' reports of Mr. Solibakke's contacts with the cases are as follows:

Appeals of Astro Industries, ASBCA Nos. 18945, 18959, 19131, and 19579--In docket reviews Mr. Solibakke was informed of the reasons for extensive delays (petition for relief under P.L. 85-804 and attempts to settle) in the processing of these appeals.

Appeal of Data Design, ASBCA No. 23511 -- A copy of an order dismissing from the docket two companion appeals, in which Mr. Solibakke concurred, appears in this file.

Appeal of General Electric Company, ASBCA No. 20930 -- The hearing member, before the hearing on this appeal, discussed with Mr. Solibakke the unusual background and legal issues which the pleadings appeared to present. The discussion did not extend to the merits of the case, which would have been premature in any event.

Appeal of General Electric Company, ASBCA No. 20957 -- This appeal and that listed immediately above were first assigned to the same hearing member. When the Rule 4 documents arrived, he realized that he may have participated in the formation of the contract. He discussed this with Mr. Solibakke and Mr. Andrews, the Vice Chairman. They decided that ASBCA No. 20930 should be reassigned but that he should retain ASBCA No. 20957.

Appeal of James S. Lee Company, ASBCA No. 18156 -- Order on a motion to jurisdiction was concurred in by Mr. Solibakke (75-1 BCA ¶11,089). Hearing was scheduled in Hong Kong. The U.S. Consul questioned protocol and Mr. Solibakke participated in making the necessary arrangements for the hearing. There were telephone conferences between the hearing member and Mr. Solibakke concerning a courtesy call on the Consul. The hearing member's ready-to-write docket became overcrowded. Mr. Solibakke was informed of the nature of the appeal and of the record generally and directed it be transferred to another member.

(footnote cont'd on following page)

b. Sellers, Conner & Cuneo undertaking

The Sellers firm has undertaken to screen Mr. Solibakke from participation in, consultation about, discussion of, or any connection whatsoever with any matter in which the firm appears as counsel and that was pending before the Board while Mr. Solibakke was a member or Chairman of the Board.4/ The firm has also undertaken that Mr. Solibakke will receive or share in no part of the fees or any other payments received by the Sellers firm and attributable to any case pending before the Board prior to Mr. Solibakke's departure. Mr. John D. Conner, executive partner of the Sellers firm, and Mr. Richard C. Solibakke have submitted affidavits confirming this undertaking. (Attachments B and C)

2. Applicable Law and Rules

We have examined the federal conflict of interest statutes and the ABA Canons applicable to conflicts of interest.5/ The requirements are set out below.

a. Federal law

Section 207 of title 18, United States Code imposes criminal sanctions for certain activities by former government employees.

Section 207(a) bars the former employee from acting as an agent or attorney for anyone in connection with any matter in which the former employee participated personally and substantially during his or her employment. This lifetime bar is applicable only to those particular matters in which the employee participated personally and to a substantial degree.

Section 207(b) restricts the former government employee for a period of one year after his or her employment from appearing

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(footnote cont'd from previous page)

Appeal of Palmetto Enterprises, ASBCA No. 22839 -- Mr. Solibakke was informed that a motion for summary judgment had been filed and of the issues to be decided on the motion. He did not participate in the decision on the motion.

4/ One convenient measure is any ASBCA docket number lower than 23591, the last case docketed on January 31, 1979.

5/ The District of Columbia Bar rules in question are the same as the ABA rules. D.C. Ct. App., Rules Governing the Bar, Rule X (1972). There have been substantial efforts to amend these rules to go further than the ABA rules in governing potential conflicts, but the Court of Appeals has not yet approved any changes.

personally as an agent or attorney for anyone in connection with any matter that was under the employee's official responsibility at any time within one year prior to the termination of his or her employment. These two subsections are designed to prevent the individual from "switching sides" after his employment and thereby using the information gained as a government employee to the disadvantage of the government.6/

Section 207(c) restricts the activities of partners of current government employees. That subsection prevents the partner from acting as an agent or attorney for anyone in which the government employee participates or has participated personally and substantially as a government employee or that is the subject of the government employee's official responsiblity. This subsection does not impute the restrictions applicable to former government employees to their partners.7/

6/ Title V of the Ethics in Government Act of 1978, Pub. L. No. 95-52, which is scheduled to come into effect on July 1, 1979, revises the post-employment restrictions now set forth in 18 U.S.C. §207. There are four basic restrictions: 1) a lifetime bar on representing anyone in matters in which the former government employee participated personally and substantially; 2) a two-year bar on representing anyone in matters that were under the former employee's official responsibility; 3) a two-year bar on aiding or assisting anyone in representation activities in matters that were under the former employee's official responsibility; and 4) a one-year bar on making any personal, oral, or written contact with intent to influence the former employee's department or agency without regard to the former employee's involvement in the matter in question.

This change in section 207, even if it were in effect, would not change the result. Title V contains no bar on activities by partners or firms of former government employees.

7/ The restrictions of section 207(c), redesignated section 207(g) under Pub. L. No. 95-52, are unchanged.

b. ABA rule with respect to disqualification of individuals

Disciplinary Rule 9-101(B) of the ABA Code of Professional Responsibility states:

> A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee. (Emphasis added.)

This rule implements Ethical Consideration 9-3, which states:

> After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists. (Emphasis added.)

Disciplinary Rule 9-101(B) has been extensively construed in ABA Formal Opinion 342. With regard to the term "substantial responsibility," the opinion states:

> As used in DR 9-101, 'substantial responsibility' envisages a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. Thus, being the chief official in some vast office or organization does not ipso facto give that government official or employee the 'substantial responsibility' contemplated by the rule in regard to all the minutiae of facts lodged within that office. Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he

> had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding that matter.8/

Thus a former public official is not required to disqualify himself with respect to any contact with a matter; the contacts must be important and material to the deliberative process.

c. ABA rule with respect to disqualification of firms

Disciplinary Rule 5-105(D) states:

> If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

Under this rule the firm is subject to disqualification only as to those matters for which an individual member of the firm must be disqualified. However, the disqualification of an individual lawyer from a particular matter because of Disciplinary Rule 9-101(B) does not necessarily require disqualification of the firm under Disciplinary Rule 5-105(D). The firm may elect to screen the disqualified individual from the firm's participation in the matter that is the subject of disqualification. If accepted by the government, such screening avoids the need for disqualification of the firm.

ABA Formal Opinion 342 states:

> [W]henever the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in the fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under DR 5-105(D). In the event of such waiver, and provided the firm also makes its own independent

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8/ ABA Comm. on Ethics and Professional Responsibility, Formal Opinion No. 342, at 13-14 (1975), (footnotes omitted).

determination as to the absence of particular circumstances creating a significant appearance of impropriety, the result will be that the firm is not in violation of DR 5-105(D) by accepting or continuing the representation in question.9/

3. Department of Defense Findings

Mr. Solibakke's involvement in the cases pending before the Board at the time of his departure as Chairman in which the Sellers firm served as counsel is irrelevant. Mr. Solibakke has voluntarily disqualified himself from all participation in these cases after February 1, 1979. The Sellers firm claims its right to continued participation in these cases on two bases: its opinion that Mr. Solibakke is not disqualified and its submission of a screening procedure. Because we find the screening procedure adequate, there is no need to decide the question of Mr. Solibakke's personal disqualification.

The undertakings by Sellers, Conner & Cuneo, supported by the affidavits of Mr. Solibakke and Mr. Conner, screen Mr. Solibakke from participation in, consultation about, discussion of, or any connection whatsoever with any matter pending before the Board while Mr. Solibakke was a member or Chairman. The undertakings also assure that Mr. Solibakke will receive or share in no part of the fee received by Sellers, Conner & Cuneo for legal services in connection with such matters. We are satisfied that these screening measures will effectively isolate Mr. Solibakke from matters that might create a conflict of interest or appearance of conflict and that the interests of the government and of the Department of Defense are protected adequately. For this reason any disqualification otherwise required under Disciplinary Rule 5-105(D) is waived.

Deanne C. Siemer

9/ Id. at 18-19.

ATTACHMENT A

CASES PENDING BEFORE THE ARMED SERVICES BOARD OF CONTRACT APPEALS PRIOR TO FEBRUARY 1, 1979 IN WHICH SELLERS, CONNER & CUNEO APPEARED AS COUNSEL

APPELLANT	DOCKET NUMBER	SERVICE
Astro Industries	18945, 18959, 19131	Army
Astro Industries	19143, 19579	Navy
AMCOT	21393	Navy
American Crane & Equipment Corp. Charleston Appeal	23517	Navy
Cosmos Engineers, Inc.	23357	Army
Cosmos Engineers, Inc.	20857	Army
Data Design	21029	DLA
Dri-Mix Products	22817, 22918, 22919 22920, 22925, 22990, 22991, 22992	DLA
Data Design	23511	DLA
Federal Electric Corp.	23096	Army
General Dynamics Corp. Electric Boat	21737	Navy
General Electric	20930	Air Force
General Electric	20957	Air Force
ITT Federal Electric Corp.	21298	Army
James S. Lee & Co.	18156	Army
Murdock Machine & Engineering Co.	20409	Navy
Hays Construction Co.	22045	Army
Intercontinental Mfg. Co.	20880	Navy
Palmetto Enterprises	22839	Army
Teledyne-Lewisburg	20491	Navy

APPELLANT	DOCKET NUMBER	SERVICE
Teledyne Ryan Aeronautical	20969	DLA
Teledyne-Continental Motors	22571	DLA
Teledyne-Continental Motors	23227	Army
Teledyne-Continental Motors	23167	Army
Thiokol Corporation	21934	Air Force
Thiokol Corporation	21981	Air Force
Royal Industries, Inc.	22235	Air Force
Universal Maritime Service Corp.	22661, 22804	Army
Zurheide-Herrmann, Inc.	23364	Air Force
Environmental Tectonics Corporation	23374	DLA

ATTACHMENT B

SELLERS, CONNER & CUNEO
ATTORNEYS AND COUNSELORS
1625 K STREET, NORTHWEST
WASHINGTON, D.C. 20006

JOHN D. CONNER*

ROBERT L. ACKERLY
WILSIE H. ADAMS, JR.
STEVEN L. BRIGGERMAN
WILLIAM H. BUTTERFIELD
BOHDAN DANTLEW
E. STANLEY DEETS
HERBERT L. FENSTER
JAMES J. GALLAGHER
MAX GOLDEN*
ROBERT A. HANSRUN
CHARLES A. O'CONNOR, III
THOMAS L. PATTEN
RAYMOND B. E. PUSHKAR
NEIL H. RUTTENBERG
HARVEY G. SMERZER
RICHARD C. SOLIBAKKE*
WILLIAM J. SPRIGGS
JOSEPH S. WAGER
GUEL WHITE
CHARLES E. YORKERS

JEFFREY H. ALTHAN
JED L. BABBIN
JEFFREY A. BOFFNER
JANIS A. CHERRY
JOHN D. CONNER, JR.
JOHN A. COURY
LAWRENCE E. COWER
JEFFREY P. ELEFANTE
LAWRENCE M. FARRELL
D. MICHAEL FITZHUGH
RICHARD A. FIVE*
ALLEN B. GREEN
ROBERT E. GRESS
E. SANDERSON HOE
JOE G. HOLLINGSWORTH
MICHAEL T. KAVANAUGH*
STEPHEN D. KNIGHT
FREDERIC M. LEVY
ROBERT M. LINDQUIST
THOMAS A. MAURO
LANE L. MOVEY
MARILYN LYNG O'CONNELL
MITCHELL N. SEGAL
D. JOE SMITH, JR.
CHRISTIAN VOLZ
KENNETH W. WEINSTEIN
BARBARA G. WEATHER
BRUCE P. WILLIAMSON, JR.

*NOT ADMITTED IN D.C.

ASHLEY SELLER
1902-1977
GILBERT A. CUNE
1913-1978

TELEPHONE
(202) 452-7500
CABLE: SELCONE

ALBERT L. REEVE
JOEL P. SHEDD
OF COUNSEL

District of Columbia) ss.

AFFIDAVIT

JOHN D. CONNER, being first duly sworn, on oath, deposes and says:

1. I am an attorney-at-law admitted to practice law in the District of Columbia, before the United States Supreme Court, and before various Federal Courts of Appeals.

2. I am Executive Partner of the law firm of Sellers, Conner & Cuneo which has its offices at 1625 K Street, N.W., Washington, D. I am Chairman of the Executive Committee of the Partnership and in that capacity I have executive responsibilities for management of the partnership, subject to policies established by the Partnership and I oversee operations of the firm.

BEST AVAILABLE COPY

3. Richard C. Solibakke became a partner in the law firm of Sellers, Conner & Cuneo on February 1, 1979. For 16 years prior to that time Mr. Solibakke was a member of the Armed Services Board of Contract Appeals and for 11 of these 16 years served as Chairman.

4. On and after February 1, 1979, Mr. Solibakke severed all official connection with the Armed Services Board of Contract Appeals.

5. Sellers, Conner & Cuneo appeared as counsel in 30 cases bearing 42 docket numbers that were pending before the Armed Services Board of Contract Appeals on February 1, 1979. A list of those cases is attached as Exhibit 1.

6. I have reviewed carefully Mr. Solibakke's contact with the cases referred to in Paragraph 5.

It is my opinion that Mr. Solibakke is not disqualified from participation in any of those appeals because while chairman he either had no participation whatsoever in these cases or because any participation that he had was not "personal and substantial" within the meaning of that term as used in the ABA Canons.

7. It is my opinion that because Mr. Solibakke is not disqualified, Sellers, Conner & Cuneo is also not disqualified from prosecuting the cases in which it appears as counsel and which were pending before the Armed Services Board of Contract Appeals before February 1, 1979.

8. Notwithstanding these opinions, in order to avoid even the slightest appearance of impropriety, Sellers, Conner & Cuneo has implemented a screening procedure that will ensure that Mr. Solibakke does not participate in any way in any case described in Paragraph 5 and does not receive any fees from any such case. That procedure has four parts:

a. Mr. Solibakke will not participate in any way, and will not consult, advise or assist any other lawyer in the firm who participates in any way in any matter in which the firm appeared as counsel and which was pending before the Armed Services Board of Contract Appeals while Mr. Solibakke was a member or chairman thereof.

b. No partner, associate, counsel or staff person employed by the firm will discuss or consult with Mr. Solibakke concerning any matter in which the firm appeared as counsel and which was pending before the Armed Services Board of Contract Appeals while Mr. Solibakke was a member or chairman thereof. This undertaking will be implemented, in part, by issuance of the internal memorandum to partners and staff of Sellers, Conner & Cuneo that is attached hereto as Exhibit 2.

c. Mr. Solibakke will receive or share in no part of any fees or other payments of any kind received by

the firm for representation in or handling of any case referred to in Paragraph 5. This undertaking will be implemented, in part, by segregating fees or other payments attributable to these cases and by compensating Mr. Solibakke only from fees or other payments not attributable to these cases. Mr. Solibakke's partnership shall not be increased in any manner to compensate for his non-participation in the fees and other payments attributable to the cases referred to in Paragraph 5. Adequate accounting records will be maintained to support compliance with this undertaking and such records will be available to the Department of Defense.

d. I will execute a further affidavit describing the firm's and Mr. Solibakke's compliance with these undertakings.

9. Sellers, Conner & Cuneo will continue in effect in the screening procedure described in Paragraph 8 as long as any case referred to in Paragraph 5 is pending before the Armed Services Board of Contract Appeals.

10. I am authorized to enter into this undertaking on behalf of the firm.

Subscribed to and sworn before me this 11th day of April, 1979.

Notary Public

My Commission Expires June 14, 1981

[illegible]	Docket Number	Service
Astro Industries	18945, 18959, 19131	Army
Astro Industries	19143, 19579	Navy
AMCOT	21393	Navy
American Crane & Equipment Corp. Charleston Appeal	23517	Navy
Cosmos Engineers, Inc.	23357	Army
Cosmos Engineers, Inc.	20857	Army
Data Design	21029	DLA
Dri-Mix Products	22817, 22918, 22919 22920, 22925, 22990, 22991, 22992	DLA
Data Design	23511	DLA
Federal Electric Corp.	23096	Army
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James S. Lee & Co.	18156	Army
Murdock Machine & Engineering Co.	20409	Navy
Hays Construction Co.	22045	Army
Intercontinental Mfg. Co.	20880	Navy
Palmetto Enterprises	22839	Army
Teledyne-Lewisburg	20491	Navy
Teledyne Ryan Aeronautical	20969	DLA
Teledyne-Continental Motors	22571	DLA
Teledyne-Continental Motors	23227	Army

EXHIBIT 1

APPELLANT	DOCKET NUMBER	SERVICE
Teledyne Continental Motors	23167	Army
Thiokol Corporation	21934	Air Force
Thiokol Corporation	21981	Air Force
Royal Industries, Inc.	22235	Air Force
Universal Maritime Service Corp.	22661, 22804	Army
Zurheide-Herrmann, Inc.	23364	Air Force
Environmental Tectonics Corporation	23374	DLA

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JED L. BABBIN
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*NOT ADMITTED IN D.C.

ASHLEY SELLERS
(1902-1977)
GILBERT A. CUNEO
(1913-1978)

TELEPHONE
(202) 452-7500

CABLE: SELCON

ALBERT L. REEVES
JOEL R. SHEDD
OF COUNSEL

MEMORANDUM

TO: The Partners and Staff of
Sellers, Conner & Cuneo

FROM: John D. Conner

In order to avoid the appearance of any conflict between the position which Richard C. Solibakke held as Chairman of the Armed Services Board of Contract Appeals prior to his recent resignation and his present position as a partner in this firm, it has been agreed that Mr. Solibakke will not participate in any manner in representation, consultation or discussion as to any matter in which this firm appears as counsel and which was pending before the Board while Mr. Solibakke served as Chairman or as a member of that Board, specifically as to any such case with an ASBCA number prior to No. 23591.

In order that this commitment may be strictly adhered to, I instruct each member of the staff not to discuss or consult with Mr. Solibakke on any matter in which this firm appeared as counsel and which was before the Armed Services Board of Contract Appeals bearing a docket number earlier than the one referred to.

John D. Conner
Executive Partner

EXHIBIT 2

ATTACHMENT C

DISTRICT OF COLUMBIA) SS

AFFIDAVIT

RICHARD C. SOLIBAKKE, being first duly sworn, on oath, deposes and says:

1. I am an attorney-at-law admitted to practice in the State of Washington. I have applied for admission to practice in the District of Columbia.

2. From April 22, 1963 through January 31, 1979, I was a member of the Armed Services Board of Contract Appeals (the "Board"). From April 22, 1968 through January 31, 1979, I was Chairman of the Board.

3. As Chairman, I normally would not become substantially involved in any pending case before the Board, until a draft opinion was prepared requiring my approval or participation. Occasionally I would become informally involved in the procedural aspects of an appeal or in preliminary discussion of legal or factual issues at a stage prior to the preparation of a draft opinion.

4. On September 26, 1978 and thereafter, I had discussions with the law firm of Sellers, Conner & Cuneo about possibly joining the firm as a partner. I made a decision to join the firm on December 1, 1978 and I communicated that decision to the Executive Partner of the firm on the same date. Upon information and belief, a vote of the full partnership of the firm was taken on December 9, 1978 and a decision was made by the firm to make me a partner in the firm. The results of that vote were communicated to me on the same day. I resigned from the Board on January 31, 1979 and have had no further official contact with the Board or the Department of Defense since that time. I joined the firm as a partner on February 1, 1979.

5. Following initial discussions with Sellers, Conner & Cuneo, one appeal only in which that firm appeared as counsel had progressed to the point where a draft opinion had been prepared requiring my approval or other substantial participation in the case. The one case that had progressed to that point was the case entitled Hayes International Corp., ASBCA Nos. 21758, 21759, and 21972. That case was tried by Sellers, Conner & Cuneo and was decided by the Board. I did not participate in any way. I was, in fact, out of town during consideration of the opinion and the "Chairman's concurrence" was given by Mr. Harris J. Andrews, Jr., as Acting Chairman.

6. Sellers, Conner & Cuneo provided me with a list of the cases in which the firm appeared as counsel and which were pending before the Board prior to February 1, 1979. That list is attached hereto as Exhibit 1.

7. In order to determine whether I had had any contact with any case on the list described in paragraph 6 that did not rise to the level of substantial participation as described in paragraph 5, I made a careful survey of the Board's records. I reviewed the Board's docket cards which contain the summary record of the procedural history of a docketed appeal and which are kept in the course of business by the Recorder of the Board. Such cards will not directly show participation in a matter unless it has been finally decided, but I used these cards to refresh my recollection of possible involvement. By this means, I identified three appeals in which Sellers, Conner & Cuneo appeared as counsel as to which I had any connection or involvement whatsoever. These appeals are as follows:

a. ASBCA No. 20930 - General Electric Co.: general early (prior to trial) discussion with Mr. Andrews about legal theories underlying appellant's position;

b. ASBCA No. 18156 - James S. Lee & Co. - participation in arrangements for overseas hearing including consideration of Department of State position

on hearing in Hong Kong; discussions with Mr. Roe of discovery problems and late request for postponement of hearing date and "split" hearing in more than one geographical location; discussion with Mr. Roe of some audit testimony and legal theory underlying appellant's case; consideration of, and action to, transfer case for decision to Mr. V. Vasiloff.

c. ASBCA No. 22839 - Palmetto Enterprises - discussion with Mrs. Burg of threshold legal issue concerning legal and jurisdictional problems in the appeal.

8. Because of the tentative nature of my consideration of the cases identified in paragraph 7 and the removal of that consideration in time and fact from the deliberations in the decision-making process, it is my opinion that I did not have "substantial" involvement in those cases as that term is used in the ABA Canons.

9. Because I did not have "substantial" involvement in any case referred to in paragraph 6 it is my opinion that I am not disqualified from participation in any such case.

10. Notwithstanding that opinion, in order to avoid even the slightest appearance of impropriety, I have not participated and will not participate in any way in any case referred to in paragraph 6. I have not counseled, advised or assisted any lawyer or staff person employed by the firm

with respect to any such case and will not so counsel, advise or assist in the future. I will not receive or share in any part of the fees or other payments attributable to any such case.

11. I will promptly, upon final disposition by the Board of any case referred to in paragraph 6, execute a further affidavit describing my actual compliance with these undertakings.

Richard G. Sobelsohn

Subscribed and sworn to before me this 11th day of April, 1979.

Notary Public

NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 1981

Astro Industries	18945, 18959, 19131	Army
Astro Industries	19143, 19579	Navy
AMCOT	21393	Navy
American Crane & Equipment Corp. Charleston Appeal	23517	Navy
Cosmos Engineers, Inc.	23357	Army
Cosmos Engineers, Inc.	20857	Army
Data Design	21029	DLA
Dri-Mix Products	22817, 22918, 22919 22920, 22925, 22990, 22991, 22992	DLA
Data Design	23511	DLA
Federal Electric Corp.	23096	Army
General Dynamics Corp. Electric Boat	21737	Navy
General Electric	20930	Air Force
General Electric	20957	Air Force
ITT Federal Electric Corp.	21298	Army
James S. Lee & Co.	18156	Army
Murdock Machine & Engineering Co.	20409	Navy
Hays Construction Co.	22045	Army
Intercontinental Mfg. Co.	20880	Navy
Palmetto Enterprises	22839	Army
Teledyne-Lewisburg	20491	Navy
Teledyne Ryan Aeronautical	20969	DLA
Teledyne-Continental Motors	22571	DLA
Teledyne-Continental Motors	23227	Army

APPELLANT	DOCKET NUMBER	SERVICE
Teledyne Continental Motors	23167	Army
Thiokol Corporation	21934	Air Force
Thiokol Corporation	21981	Air Force
Royal Industries, Inc.	22235	Air Force
Universal Maritime Service Corp.	22661, 22804	Army
Zurheide-Herrmann, Inc.	23364	Air Force
Environmental Tectonics Corporation	23374	DLA

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
11 July 1979

MEMORANDUM FOR THE DEPUTY SECRETARY OF DEFENSE

Subj: Recommendation to disqualify the law firm of Sellers, Connor and Cuneo from representing companies in cases presently pending before the Armed Services Board of Contract Appeals and to establish additional rules governing attorneys practicing before the Defense Department

Ref: (a) My memo dtd 19 January 1979 for the Secretary of the Navy, same subject
(b) SECNAV memo dtd February 6, 1979, for you, subject: ADM Rickover's recommendation to disqualify the law firm of Sellers, Connor and Cuneo -- Action memorandum
(c) My memo dtd 8 March 1979 for you, same subject
(d) DOD General Counsel memo dtd April 12, 1979, for General Counsels of the Army, Navy, Air Force and Counsel, Defense Logistic Agency, subj: Representation by the law firm of Sellers, Connor and Cuneo in cases currently before the ASBCA.

1. In reference (a) I reported to the Secretary of the Navy that Mr. Richard Solibakke, then Chairman of the Armed Services Board of Contract Appeals (ASBCA) was reported to be resigning to accept a position with Sellers, Connor and Cuneo, a law firm which is heavily involved in prosecuting claims against the Government. I recommended that the Secretary warn that firm of the potential conflict of interest that would be involved in the hiring of Mr. Solibakke. I also recommended that formal action should be taken with the American Bar Association (ABA) and with the District of Columbia Bar if the firm hired Mr. Solibakke but failed to withdraw from ASBCA cases in which he could not accept employment under applicable provisions of the ABA's Code of Professional Responsibility. By reference (b) the Secretary of the Navy forwarded the matter to you since the question I had raised affected other Defense components.

2. By reference (c) I reported that Mr. Solibakke had joined Sellers, Connor and Cuneo on February 1, 1979;

that the firm apparently had no intention of withdrawing from its ASBCA cases; and that the Navy was in receipt of interrogatories from that firm in a case which was pending before the Board during Mr. Solibakke's tenure as chairman. I recommended that the Navy not act on those interrogatories until the Defense Department had resolved the possible conflict of interest involving Mr. Solibakke.

3. In reference (d), the DOD General Counsel stated that there was no Federal statute which would disqualify the law firm under these circumstances. She acknowledged that, under the ABA's Code of Professional Responsibility and its Disciplinary Rules, a law firm may not continue to represent a client that any member of the law firm may not represent. In Formal Opinion 342, however, the ABA provided that the Government could elect to waive disqualification of the law firm if the member in question were effectively "screened" from having anything to do with any case from which he is disqualified.

4. In arguing against its disqualification, Sellers, Connor and Cuneo submitted the following to the DOD General Counsel:

a. An affidavit by Mr. Solibakke in which he stated that as Chairman of the ASBCA he would not normally have been involved "in any substantial manner in a pending case until a draft opinion was prepared requiring my approval" and that he could remember having "some contact" with only three of the law firm's current ASBCA cases. The DOD General Counsel determined that none of these cases had reached the draft opinion stage at the time Mr. Solibakke joined the Sellers, Connor and Cuneo firm.

b. An affidavit by Mr. John Connor, a senior member of the firm. Mr. Connor stated that Mr. Solibakke's participation in the cases pending before the Board was not "personal and substantial" within the meaning of the ABA canons and that he therefore should not be disqualified from further participation in these cases after leaving the Government. Mr. Connor stated, however, that, in order to avoid all appearance of impropriety, Mr. Solibakke would not participate in any of the ASBCA cases which had been before the Solibakke Board in any way, nor share in any of the fees generated by those cases.

5. In reference (d), the DOD General Counsel concluded that Sellers, Connor and Cuneo had effectively screened Mr. Solibakke by agreeing that he would not participate in or share fees from any ASBCA cases pending during his

tenure on the Board. She concluded that this obviated the need to make a determination whether Mr. Solibakke was personally subject to disqualification. She also concluded that "...the Sellers firm is not disqualified from any case in which they are now engaged and should not be so disqualified in the future". Notwithstanding that conclusion and presumably to put this matter to rest once and for all, the General Counsel then proceeded to waive disqualification to the extent it might otherwise be required by applicable provisions of the ABA Code. By this action, the DOD General Counsel is allowing the firm to continue representing clients in all 30 ASBCA cases it had before the Board as of January 31, 1979, when Mr. Solibakke resigned.

6. In my opinion, the Government should set its own rules and insist on high standards of conduct for lawyers doing business before the Board or elsewhere in DOD. It appears that the Government cannot safely rely on the legal profession to resolve issues in the public's behalf. Formal Opinion 342 is a case in point. According to press accounts, the waiver provision of Formal Opinion 342 was itself largely the result of intervention by large law firms and senior Government attorneys, the same vested interests who stand to benefit the most therefrom.

7. In the Solibakke case, the DOD General Counsel has not, in my view, adequately protected the interests of the Federal Government. The Defense Department should discourage private law firms from offering jobs to the Government attorneys and administrative judges with whom those firms deal. Important legal positions in Government should not be simply training billets in how best to represent clients against the Government.

8. The Government's legal business, like its other business, should be conducted at arm's length,with the public interest placed foremost. Government attorneys are placed in a difficult position when opposing counsel may be a source of their future employment. No matter how objective a Government attorney actually remains under these circumstances, the situation does not inspire public confidence.

9. One reason for disqualifying a law firm which hires a lawyer from the other side is to protect attorney-client confidentiality. It is difficult to confide in one's attorney when tomorrow that same attorney may be working for the opposition. In granting a waiver, the DOD General Counsel did not address this point.

10. Many lawyers contend that to attract and retain good people, the Government must allow attorneys to switch back and forth between Government and private practice. I do not believe that argument is valid. The Government offers some of the most interesting legal work available today and there is a surplus of law school graduates.

11. To help improve the climate in which the DOD conducts its legal business, I recommend that the Department:

a. Rescind the waiver granted to Sellers, Connor and Cuneo so that the firm will be disqualified from ASBCA cases which were before the Solibakke Board. By granting the waiver and allowing Sellers, Connor and Cuneo to continue in these cases, DOD is encouraging other law firms to hire away its lawyers.

b. Discontinue granting the waivers provided for by ABA Formal Opinion 342.

c. Instruct all DOD personnel to report instances when DOD lawyers join firms with whom they have been dealing To my knowledge, the DOD presently has no way of knowing the extent of the problem. I am unaware of the DOD ever addressing the issue of disqualification other than in the two instances I formally reported.

d. Establish rules to govern private attorneys and firms appearing before the ASBCA or representing clients before other Defense agencies. These rules should provide a basis for discipline or disqualification of attorneys appearing before the Board.

e. Obtain as a condition of employment for each new attorney a formal commitment that, for a period of two years after leaving the Government, he will not work for law firms or companies which have been litigating cases, negotiating contracts, processing claims or handling other adversary matters against his agency.

12. The issues I am raising pertain to the credibility of the Defense Department and the establishment of a proper climate for conducting public business. Some Government lawyers may have a personal stake in the final outcome. Therefore I believe these issues need to be addressed at the policy level of DOD and not simply turned over to Office of General Counsel which has shown itself unable or unwilling to take the necessary corrective action in this area.

13. I would appreciate being informed of the action you take in this matter.

H. G. Rickover

Copy to:
General Counsel, Office of Secretary of Defense
Secretary of the Navy
Assistant Secretary of the Navy
(Manpower, Reserve Affairs and Logistics)
General Counsel of the Navy
General Counsel of the Air Force
General Counsel of the Army
General Counsel, Defense Logistics Agency
Chief of Naval Operations
Chief of Naval Material
Commander, Naval Sea Systems Command

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
WASHINGTON, D. C. 20301

AUG 8 1979

MEMORANDUM FOR ADMIRAL H. G. RICKOVER, DEPUTY COMMANDER FOR NUCLEAR PROPULSION, NAVAL SEA SYSTEMS COMMAND

SUBJECT: Post employment restrictions on DoD employees

The Deputy Secretary of Defense asked me to reply to your memorandum dated July 11, 1979. Rules imposing post employment restrictions for government employees must balance the interests of the Government and the rights of individuals in a free society. The recently enacted Ethics in Government Act of 1978, as amended, reflects the will of the Congress on how these interests should be balanced. There is no reason to believe that the Congress' efforts in this regard will be ineffective in safeguarding the interests of this Department.

My recent determination with respect to the need for the disqualification of the Sellers, Connor & Cuneo firm in its business before this Department is consistent with the pertinent statutes and with standards of conduct that the bar imposes on attorneys.

Deanne C. Siemer

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
19 Oct 1979

Robert E. Jordan III, Chairman
District of Columbia Bar, Ethics Committee
Steptoe & Johnson
1250 Connecticut Avenue
Washington, D.C. 20036

Dear Mr. Jordan:

Thank you for your letter of October 3, 1979, regarding the status of my inquiry concerning the propriety of a newspaper advertisement placed by a former Government lawyer seeking representation of persons with claims against the Government. I understand that the response to my inquiry has been assigned first priority for your October 23 Committee meeting and that, while you can provide no assurance as to the outcome, you hope a final opinion can be issued after the meeting.

It has been more than a year since I first raised this issue and only now is it scheduled to be addressed by the District of Columbia Bar Ethics Committee. The issue is straightforward. There should be no reason why your Ethics Committee cannot address this issue squarely at the October 23rd meeting and decide whether it will or will not take action to preclude a lawyer from soliciting business involving the representation of persons with claims against his former employer or client.

A decision on this matter should not require further study, additional legal research, or reviews by other groups. Nonetheless, I am compelled to tell you that I predict the Committee will avoid a decision at this meeting. My experience has been that many members of the legal "profession" are masters at the art of delay and obfuscation--particularly when trying to avoid an unfavorable decision or an unpleasant issue.

I would appreciate it very much if you would bring this letter to the attention of the Committee at the October 23rd meeting for the specific purpose of obtaining prompt action in this matter.

Sincerely,

H. G. Rickover

H.G. Rickover

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PAUL MICKEY
OF COUNSEL

October 27, 1979

Admiral Hyman G. Rickover
Department of the Navy
Naval Sea Systems Command
Washington, D. C. 20363

Dear Admiral Rickover:

This is in further response to your inquiries concerning the propriety of a newspaper advertisement by a former government lawyer, and in specific response to your letter of October 19, 1979.

The Ethics Committee took up the draft opinion at its meeting of October 23. There was a substantial discussion concerning the issues raised by your inquiry. As a result of the discussion, the draft which I previously sent to you will be revised, and I expect it to be finally approved and released at the November meeting.

As you requested, I brought your letter to the attention of the Committee, so that they could appreciate your strongly-held views concerning the legal profession.

You may be interested in knowing the general thrust of the Committee's conclusions regarding your inquiry. First of all, the Committee concluded that the only objectionable portion of the advertisement was that part in which the attorney called attention to his availability to sue his former client, the United States Government, including the Department of the Navy. The Committee concluded that EC 2-8A, which was referred to in the draft opinion which I previously sent you, was not an appropriate basis for characterizing the attorney's advertisement as improper. However, it did conclude that the

advertisement was inconsistent with the Ethics Considerations under Canon 9 which were also referred to in the prior draft:

A majority of the Committee is of the view that conduct which does not violate a Disciplinary Rule (referred to in lawyers' jargon as a "DR") should not be described as "unethical" because, under the scheme of the Code of Professional Responsibility, only the Disciplinary Rules subject a lawyer to punishment, while Ethical Considerations are deemed to be "aspirational" in nature. Accordingly, the final opinion will refer to the conduct of the lawyer as inconsistent with the aspirational objectives of EC 9-2 and EC 9-6.

A majority of the Committee also felt that the issues raised by your inquiry were of sufficient concern that they should be referred to the "Code Subcommittee" which is responsible for considering possible amendments to the Code of Professional Responsibility. That referral will be made, and the fact that it is being made will be noted in the final version of the opinion.

I might add that I personally do not agree with the majority of the Committee in its views with respect to the nature of the Ethical Considerations. It is my view that conduct which is inconsistent with an Ethical Consideration should be referred to as "unethical" rather than merely being characterized inconsistent with some aspirational objective. It is my view that the Disciplinary Rules under the Code of Professional Responsibility are so limited in scope as to be a highly inadequate measure of what conduct is unethical. While I recognize that lawyers cannot be brought before disciplinary boards for violations of Ethical Considerations, I believe that Ethics Committees, which issue advisory opinions, should consider the Ethical Considerations in determining whether conduct which is the subject of an opinion is ethical or unethical. Regrettably I have been unable to persuade a majority of the Committee to adopt my point of view.

I will see that you are furnished with a copy of the final opinion when it is released.

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PAUL MICKEY
OF COUNSEL

January 31, 1980

Admiral Hyman G. Rickover
Department of the Navy
Naval Sea Systems Command
Washington, D. C. 20363

Dear Admiral Rickover:

I wrote you on October 27, 1979 informing you that the Legal Ethics Committee had discussed a draft opinion in response to your inquiry concerning an advertisement by a former government lawyer. As I indicated in that letter, the discussion made it necessary to revise the draft opinion in various respects.

Those revisions have now been completed and the revised draft was submitted to the Ethics Committee and approved at its January meeting. I am enclosing Opinion No. 82, which is the final opinion issued in response to your inquiry.

Sincerely yours,

Robert E. Jordan III
Chairperson, Legal Ethics Committee
District of Columbia Bar

Enclosure

LEGAL ETHICS COMMITTEE
DISTRICT OF COLUMBIA BAR
Opinion No. 82

ADVERTISEMENT BY FORMER GOVERNMENT ATTORNEY DETAILING NATURE OF PRIOR GOVERNMENT EXPERIENCE AND ANNOUNCING WILLINGNESS TO HANDLE CLAIMS AND LITIGATION AGAINST GOVERNMENT
DR 9-101(B), DR 4-101(B)(3), CANONS 2, 4, 5, 9 AND 27, DR 2-102(A)(2), DR 2-101, DR 2-101(A), DR 2-101(B)(4), DR 9-101(B), EC 2-8A, DR 9-101(C), EC 9-2, EC 9-6

Synopsis:

This inquiry involves the propriety of an advertisement by a former government attorney, in private practice, who places a newspaper advertisement describing his prior government position and the nature of his experience, and announcing his availability for suits against agencies of the United States Government. The Committee concludes that the advertisement in question does not violate any of the Disciplinary Rules under Canons 2, 4, 5 or 9, but that the element of inviting representations against a former client, although not a violation of a Disciplinary Rule, was inconsistent with EC 9-2 and 9-6.

Facts Presented:

The inquirer has furnished to the Committee a copy of an advertisement placed in a national newspaper by an attorney. In the advertisement, the attorney announces his resignation from a position as an attorney employed by an agency of the federal government. The attorney describes the nature of his activities while employed by the government, specifically

mentioning his participation in the investigation and settlement of certain major claims. In addition, the attorney characterizes his work for the government as involving "in-depth factual and legal analysis" of the claims. Finally, the attorney notes that he has returned to private practice and is now available for consultation with respect to the handling of claims and litigation against "any agencies of the United States government."

The inquirer asks whether an advertisement of this nature is consistent with an attorney's ethical obligations under the Code of Professional Responsibility, and specifically whether it is proper to solicit representations opposing the interests of former clients.

Questions Presented:

The inquiry implicates three distinct areas of the Code of Professional Responsibility: First, the scope of permitted advertising under the recently revised Canon 2; second, the scope of an attorney's duty of loyalty to a former client, under Canon 4; third, because of the element of changing sides from a public position to private practice, the "appearance of impropriety" provisions of Canon 9.

Discussion:

In responding to this inquiry, the Committee has assumed that the attorney placing the advertisement will not

become involved in representing private interests in connection with any matter as to which the attorney had substantial responsibility while in public service. If he were to do so, he would not only violate the provisions of DR 9-101(B), but might also violate the parallel criminal provisions of 18 U.S.C. § 207(a). Similarly, the Committee has assumed that the attorney placing the advertisement will not permit himself to be involved in any matter within his area of responsibility while in government service in a fashion which would violate the provisions of 18 U.S.C. § 207(b)-(c).[1/] The Committee also assumes that the advertising attorney will not, as proscribed by DR 4-101(B)(1), "use a confidence or secret of his client to the disadvantage of the client." Finally, the Committee assumes that he will not, in violation of DR 4-101(B)(3), "use a confidence or secret of his [former] client for the advantage of himself or of a third person unless the [former] client consents after full disclosure." These provisions of DR 4-101 apply to confidences and secrets of former as well as present clients.[2/]

1/ The scope of prohibitions under 18 U.S.C. § 207(b)-(c) varies, based on the prior grade of the former government employee involved, as a result of recent amendments to 18 U.S.C. § 207. See Title V of the Ethics in Government Act of 1978, Public Law 95-521, October 26, 1978, 92 Stat. 1864-67, as amended by Public Law 96-28, June 22, 1979, 93 Stat. 77-78.

2/ See, e.g., ABA Informal Opinions 1293 (1974) & 1361 (1975).

With respect to representations in which an attorney will be acting in opposition to the interests of a former client, it is important to note that there are certain prohibitions arising under Canons 4 and 5, applicable to all attorneys without regard to former government affiliation. DR 9-101(B) prohibits private employment in a matter as to which an attorney previously had substantial responsibility while in government service. However, under the Canon 4-Canon 5 restrictions, any attorney may be disqualified from representing interests opposed to those of a former client if there is a "substantial relationship" between the new representation and the prior representation. Under some circumstances, the substantial relationship test may produce a broader disqualification than that encompassed in the definition of "matter" under DR 9-101(B). For example, an attorney may represent the government in connection with a particular claim involving a particular contractor. A subsequent claim involving a different contractor might be viewed as a distinct "matter" for purposes of DR 9-101(B), but there might nonetheless be a "substantial relationship" between the new claim and the prior claim. Obviously, application of the substantial relationship test can be applied only after full examination of the facts of particular situations, and there is no indication on the face of the inquiry which would justify inferring that any

particular representation induced by the advertisement would be improper.[3/]

The question which is thus directly presented by the inquiry is whether the advertisement cited, or the activities plainly contemplated by that advertisement, would violate provisions of the Code of Professional Responsibility even if the attorney were to conduct himself in a fashion consistent with Canons 4 and 5, and DR 9-101(B).

We turn first to the question of restrictions on attorney advertising. Prior to the recent amendments to Canon 2, in the wake of the Supreme Court decision in Bates v. State Bar of Arizona, 433 U.S. 350 (1977), virtually every form of attorney advertising directed to the general public was prohibited. Hence the kind of advertisement involved here would have been in violation of the prior provisions of the Code of Professional Responsibility without regard to the prior status of the advertiser as a government employee. See former DR 2-101(A) and DR 2-101(B). Limited exceptions were made for certain forms of professional announcements. However, under prior DR 2-102(A)(2), even a professional announcement card could not state biographical data except to the extent "reasonably necessary to identify the lawyer or to explain the

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3/ For an extensive discussion of attorney disqualification in the context of the "substantial relationship" test, see Leibman, The Changing Law of Disqualification: The Role of Presumption and Policy, 73 Nw. U.L.Rev. 996 (1979).

change in his association." The same provision specifically permitted a lawyer's announcement card to state his or her "immediate past position." Even under the provisions of former Canon 27, it was considered proper for an announcement card to state the immediate past government position of a lawyer undertaking a new affiliation, although Canon 27 did not specifically so provide. See ABA Formal Opinion 301 (1961).

Under Canon 2 as amended by the District of Columbia Court of Appeals in 1978, the permissible scope of lawyer advertising has been greatly broadened. Generally speaking, subject to certain specific exceptions, advertising which is not false, fraudulent, misleading or deceptive, is permitted. See DR 2-101. The provision of prior DR 2-102(A)(2), with respect to the listing of immediate past positions is omitted. There appears to be no provision in the current Disciplinary Rules under Canon 2 which applies to the kind of advertising referred to by the inquirer.

There is a provision in DR 2-101(B)(4), which prohibits advertising "intended or . . . likely to convey the impression that the lawyer is in a position to influence improperly any court, tribunal, or other public body or official." (Emphasis added.) The Committee does not believe that the kind of statement of prior government position, including the statement designed to emphasize the attorney's particular qualifications for engaging in litigation against his former

employer-agency, can fairly be interpreted as conveying an impression of capability to exert improper influence. There is nothing inherently improper about a former government attorney, who otherwise complies with the provisions of the Code of Professional Responsibility and applicable law, undertaking to utilize expertise of a general nature (and not involving client confidences or secrets) gained in his prior government employment in subsequent representation of private clients. On the other hand, if the attorney were to suggest an ability to have matters resolved other than on the merits by his former colleagues, that would, in the judgment of the Committee, convey an impression of ability to influence a government agency on improper grounds, and violate DR 2-101(B)(4).

The Committee concludes that no Disciplinary Rule under Canon 2 is applicable to the factual situation set forth in the inquiry.

The Committee has considered the applicability of EC 2-8(A). That Ethical Consideration does contain a statement that "prominence should not be given to a prior government position outside the context of biographical information." However, the quoted language is merely an example designed to illustrate the more general principle set forth in the preceding sentence: "Advertising marked by excesses of content, volume, scope or frequency, or which unduly emphasizes unrepresentative biographical information, does not provide [the

public benefit derived from useful advertising]." The advertisement which is the subject of the inquiry does not appear to fall within the general principle, nor does it appear to manifest any of the excesses which are referred to, and the use of biographical information does not appear to provide undue emphasis upon "unrepresentative" biographical information. It is the view of the Committee that EC 2-8(A) was not intended to preclude the essentially accurate and truthful disclosure of information concerning prior government employment, at least where such disclosures are in reasonable balance with the entire advertising message which is being conveyed. In reaching this conclusion, the Committee was aware of, and influenced by, the fact that attorneys with prior government experience are free, in person-to-person contacts with prospective clients, to describe and characterize their prior government service in a fashion not materially different from the description contained in the advertisement subject to consideration here. It appears unnecessary and undesirable to interpret EC 2-8(A) in a way which would preclude truthful and accurate advertising disclosure with respect to prior government experience when the identical disclosures made in direct conversation with prospective clients would not be subject to criticism under any provision of the Code of Professional Responsibility.

A further question is the propriety of the advertisement under Canon 9, which provides that "A lawyer should avoid even the appearance of impropriety."

The limitations of DR 9-101(B), prohibiting representation of private interests by a lawyer who previously had substantial responsibility for the same matter as a government employee have already been noted, supra at 2.

DR 9-101(C) makes it improper for a lawyer to "state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official." This provision is similar in import to that of DR 2-101(B)(4). The discussion of the latter provision (supra at 6) applies to DR 9-101(C) as well; more than simply cataloging the details of prior government experience is necessary to justify the conclusion that a lawyer is implying the capacity to exert improper influence.

The Committee concludes that no Disciplinary Rule under Canon 9 prohibits the advertisement in question here. Since previous portions of this opinion have indicated that, based on the facts disclosed in the inquiry, there are no Disciplinary Rules under other potentially relevant Canons (2, 4 and 5) which prohibit the advertising which is the subject of this inquiry, the Committee concludes that the advertisement in question is not prohibited by, or unethical under, the Code of Professional Responsibility. This conclusion

reflects the view of a majority of the Committee that conduct which does not violate a Disciplinary Rule cannot properly be characterized as "unethical." Such conduct may nonetheless be inconsistent with one or more Ethical Considerations, and hence inconsistent with the aspirational objectives of the Code: As the preamble and preliminary statement to the Code of Professional Responsibility state, "the Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive." While every member of the District of Columbia Bar should be encouraged to pursue and achieve the aspirational objectives set forth in the various Ethical Considerations, a majority of the Committee is not prepared to characterize deviations from the Ethical Considerations as "unethical."

While the Committee is unwilling to brand the conduct described in the inquiry as unethical, it is not prepared to endorse or encourage such conduct, which is inconsistent with certain Ethical Considerations. EC 9-2 exhorts lawyers, when "ethical guidance does not exist" to act "in a manner which promotes public confidence in the integrity and efficiency of the legal system and the legal profession." In a similar vein, EC 9-6 refers to the duty of lawyers to, among other things, "conduct [themselves] so as to reflect credit on the legal profession and to inspire the confidence, request and trust of [their] clients and the public."

The Committee is of the view that the advertisement in question will not (1) promote confidence in the integrity and efficiency of the legal profession, or (2) reflect credit on the profession, or (3) inspire confidence in the profession on behalf of clients and the public. This conclusion is not related to the essentially biographical disclosure of prior government position and the activities undertaken in such prior position, which we assume to be truthful and accurate. Had the advertisement stopped at that point, the Committee would view the advertisement as presenting no impropriety under the Code of Professional Responsibility. But the advertisement goes further; it announces the availability of the advertising attorney for consultation with respect to claims and litigation against "any agencies of the United States Government." The public and prospective clients are not likely to have a favorable impression of an attorney who, having spent a number of years in the full time employment of a particular client, in this case the United States Government, leaves that employment and publicly announces his or her special qualifications to initiate claims or litigation against such former client. An analogy can be drawn to situations not involving prior public service. Suppose an attorney were to work as counsel for a private company for many years, and were thereafter to withdraw from representing that private client. A <u>public</u> announcement by the attorney of his or her availability to engage in

representations directly opposed to the interests of the long-time former client would surely undermine the public confidence in the profession; clients rightfully expect that they can retain attorneys without having such attorneys subsequently engage in public pronouncements that their prior engagement renders them peculiarly well suited to current activities opposing the interests of former clients. While the Committee recognizes the existence of differences between prior representation of private interests, it is of the view that such differences as may exist between the two situations do not invalidate the analogy which is made above. Accordingly, the Committee concludes that such conduct would offend both the Bar and the public, both where the prior representation was private in nature and where it involved representing governmental interests. It undermines trust, confidence and respect for the profession, and is therefore inconsistent with the objectives of EC 9-2 and 9-6.

In summary, the Committee concludes that no Disciplinary Rule under the Code of Professional Responsibility as currently in force in the District of Columbia prohibits advertising of the kind in question here.[4/]

4/ The Committee is nonetheless concerned that its conclusion leaves former government officials free to publicly invite retainers which involve litigation against former clients. The Committee has therefore asked its Code Subcommittee to consider the desirability of a specific Disciplinary Rule dealing with such situations.

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
5 December 1979

Robert L. Weinberg, President
The District of Columbia Bar
839 17th Street, N.W.
Washington, D.C. 20006

Dear Mr. Weinberg:

As you know, large segments of the public lack confidence in the legal profession and question whether the profession lives up to its obligations for setting and enforcing standards of ethical conduct by its members. My experience to date tends to corroborate this lack of confidence and skepticism.

In January 1975 I informed the General Counsel of the Department of Defense that a large law firm representing some shipbuilders in their contract claims against the Navy had hired the Deputy Counsel for Claims of the Navy command responsible for shipbuilding contracts. This lawyer's responsibilities included analysis of shipbuilding contract claims and preparation of the Government's defenses. According to a literal interpretation of the American Bar Association's Code of Professional Responsibility, the law firm involved should have withdrawn from representation of claims for which the former Navy lawyer had been responsible. I pointed this out to the Navy General Counsel who raised the issue with the law firm, but the law firm refused to withdraw. The Navy General Counsel then asked the American Bar Association (ABA) for an opinion. After deliberating for some 7 months, the ABA finally issued a ruling which implied that the law firm should be disqualified from continued representation in the claims, but stated the Government may waive the disqualification. The Navy took no action to disqualify the law firm.

In October 1978 I wrote to the American Bar Association regarding a Wall Street Journal advertisement in which a former Navy lawyer touted his claim experience as a Navy attorney and solicited clients who desired to submit claims against the Government. An ABA official informed me the Association had no authority to investigate disciplinary matters, and referred my inquiry to the District of Columbia Bar which eventually addressed the matter during an Ethics Committee meeting in October 1979. While the Ethics Committee has not yet taken final action on this item, I have been informed that the members have already concluded the attorney did not violate the Disciplinary Rules of the profession's Code of Professional Responsibility.

An article in the December 3, 1979 issue of the Washington Post entitled "Lawyer's Private Visit Stuns the Supreme Court" highlights another case involving a possible violation of the legal profession's Code of Professional Responsibility. The article contains an excerpt from a forthcoming book about the Supreme Court entitled, The Brethren.

According to the article, a prominent Washington attorney, Mr. Thomas G. Corcoran, contacted two Supreme Court Justices regarding a case pending before the Supreme Court. The article states such out-of-court contacts with justices about cases are unethical.

In view of the widespread attention drawn to this incident by the Post article, I recommend the District of Columbia Bar investigate whether Mr. Corcoran actually contacted the Supreme Court Justices as reported; determine whether the behavior of Mr. Corcoran violates the legal profession's Code of Professional Responsibility; and if so, take appropriate disciplinary action.

I would appreciate being informed of the action you take in this matter. I trust the reply will deal directly with the issue involved and will not be delayed for months as has been the case with the previous issues I have raised with bar associations.

H.G. Rickover

Copy to:
Robert E. Jordan, III
Chairman, District of Columbia Bar,
Ethics Committee

H. Pickering
sident

ert J. Pofiel
sident Elect

Seman Macon
retary

Ann Determan
asurer

J. David Ellwanger
Executive Director

Zona F. Hostetler
Director - Public
Service Activities

Jane Ottenberg
Director - Continuing
Legal Education and
Publications

The District of Columbia Bar

1426 H STREET, N.W., SUITE 840 WASHINGTON, D.C. 20005

Bar Office: 638-1500 — Public Service Activities: 638-1560
Continuing Legal Education and Publications: 638-4799

December 19, 1979

Admiral H. G. Rickover
Department of the Navy
Naval Sea Systems Command
Washington, D. C. 20362

Dear Admiral Rickover:

My predecessor as President of The District of Columbia Bar, Robert L. Weinberg, Esq., yesterday forwarded to me your letter dated December 5, 1979, regarding the article in the December 3, 1979 issue of The Washington Post entitled "Lawyer's Private Visit Stuns the Supreme Court" which was excerpted from the forthcoming book entitled "The Brethren".

Private, that is ex parte, contacts with judges relating to pending cases are generally condemned by the Code of Professional Responsibility governing the Bar. They are also usually counterproductive as appears to have been the case in the instance described in the cited article. Nevertheless, they must be regarded seriously since they give the appearance of undue advantage and can impair public confidence in the legal profession and in the impartial administration of justice.

Whether the visit referred to in your letter and the cited article occurred, and, if so, what action should be taken are matters which the court rules governing The District of Columbia Bar commit to the jurisdiction of the Board on Professional Responsibility. Accordingly, I have forwarded your letter to that Board for appropriate consideration. A copy of my forwarding letter is enclosed. I am sure that you will be hearing in due course from the Board about the matter. Meanwhile, thank you for your interest and concern.

Sincerely,

John H. Pickering

John H. Pickering
President

Encl.

...n H. Pickering
...President

...phen J. Pollak
...President-Elect

...n Kaman Marvory
...Secretary

...e-Ann Determan
...Treasurer

J. David Ellwanger
Executive Director

Zona F. Hostetler
Director - Public Service Activities

Jane Ottenberg
Director - Continuing Legal Education and Publications

The District of Columbia Bar
1426 H STREET, N.W., SUITE 840 WASHINGTON, D.C. 20005
Bar Office: 638-1500 – Public Service Activities: 638-1560
Continuing Legal Education and Publications: 638-4799

December 19, 1979

Fred Grabowsky, Esq.
Bar Counsel
Board on Professional Responsibility
1426 H Street, N. W., Suite 840
Washington, D. C. 20005

Dear Mr. Grabowsky:

Forwarded for appropriate consideration by the Board is the enclosed letter from Admiral Rickover to my predecessor which raises matters committed under the court rules to the jurisdiction of the Board. I also enclose a copy of my acknowledgment to Admiral Rickover and a copy of my predecessor's acknowledgment.

Sincerely,

John H. Pickering

John H. Pickering
President

Encls.

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
11 December 1979

Leonard Janofsky, President
American Bar Association
1155 East 60th Street
Chicago, Illinois 60637

Dear Mr. Janofsky:

As President of the American Bar Association (ABA), you are surely aware of the public's growing cynicism toward lawyers. A large part of the public's disenchantment with the legal profession, in my opinion, stems from the massive failure of the profession to discipline its members. While the ABA takes credit for establishing rules of conduct--the Code of Professional Responsibility--these rules, rather than being enforced, often are used as a screen to deflect criticism. That is the reason why I have frequently called the ABA the ABPA--American Bar Protective Association.

Enclosed is a letter I sent to the President of the District of Columbia Bar on December 5, 1979 regarding the recent article in the Washington Post about a lawyer who contacted two Supreme Court Justices concerning a case pending before that tribunal. I have recommended that the Bar investigate the incident and take appropriate disciplinary action. Based on my past experience with that organization, I predict the District of Columbia Bar will somehow finesse the issue.

I know that in disciplinary matters the ABA defers to local bar associations. However, since the ABA takes credit for establishing its Code of Professional Responsibility, it also bears responsibility to see that the Code is not simply window dressing--as currently appears to be the case.

It is important that you be aware of the attached referral to the District of Columbia Bar. The incident described has received national publicity and appears to be a flagrant violation of the legal profession's standards of conduct.

An essential feature of a true profession is that it set and enforce a code of conduct. This is particularly important in the practice of law since lawyers are responsible to society for the administration of justice. And when people think of

the legal profession, they think of its primary spokesman, the ABA. The question is whether the ABA is a professional organization or just another industry lobbying association.

This case presents an excellent opportunity to find out whether or not the legal profession is willing and able to make its disciplinary system work. I look forward to your response.

Sincerely,

H. G. Rickover

H.G. Rickover

Enclosure: As stated

Copy to:
Attorney General of the United States
General Counsel, Department of Defense
General Counsel, Department of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
LEONARD S. JANOFSKY
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE: 312/947-4042

December 21, 1979

H.G. Rickover, Vice Admiral
Naval Sea Systems Command
Department of the Navy
Washington, D.C. 20362

Dear Admiral Rickover:

Thank you for your letter of December 11 with which you enclosed a copy of your letter of December 5, 1979, to Robert L. Weinberg, President of the District of Columbia Bar. You have raised the issue of the alleged misconduct of Thomas G. Corcoran, a Washington lawyer, in contacting two Supreme Court justices regarding a case then pending before the Court.

You may be interested to know that I was a guest on a Washington radio station talk show on December 2 which concerned The Brethren. During that program I stated that the only revelation of alleged impropriety which I had gleaned from the excerpts of The Brethren was the purported conduct of Mr. Corcoran. Thus you will understand that I share your concern.

The Model Code of Professional Responsibility of the American Bar Association does indeed prohibit ex parte approaches to a court when a matter is under consideraton. I am advised that the Code adopted in the District of Columbia follows the Model Code. Such conduct clearly undermines our judicial system.

Following receipt of your letter I talked by telephone with John H. Pickering of Washington, who succeeded Mr. Weinberg last June as President of the District of Columbia Bar. Mr. Pickering informed me that this matter will be referred promptly to the Board of Professional Responsibility of the District of Columbia Bar to determine the facts and to take appropriate action.

The American Bar Association is acutely aware of the profession's uneven enforcement of disciplinary standards in the past. In recent years, however, the leaders of the profession across the country have renewed and enlarged their activities in the enforcement of ethical standards. I believe that enormous progress has been made and that the profession has been strengthened as a result of these recent efforts. An ABA committee is now drafting revised Model Rules of Professional Conduct which will govern our profession as we move into the 1980s. Those guidelines should greatly enhance the performance of this country's lawyers and safeguard the public against improper behavior.

In a profession that accepts responsibility for self-discipline, there must be a high level of attention to issues of professional ethics and a vigorous program of disciplinary enforcement. I would be pleased to discuss this subject and perhaps other areas of common interest with you at our mutual convenience when I am next in Washington. In the meantime, be assured that The District of Columbia Bar is investigating Mr. Corcoran's alleged conduct.

We appreciate your letter and assure you of our deep sense of concern and responsibility in this matter.

Cordially,

Leonard S. Janofsky

Leonard S. Janofsky

LSJ:kay
3673C

cc: John H. Pickering, Esquire

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

31 March 1980

Mr. Fred Grabowsky
The Board on Professional Responsibility
District of Columbia Court of Appeals
1426 H. Street, N.W.
Suite 840
Washington, D.C. 20005

Dear Mr. Grabowsky:

In a letter to the President of the District of Columbia Bar dated 5 December 1979, I recommended the District of Columbia Bar investigate allegations reported in a Washington Post article that Mr. Thomas G. Corcoran, a prominent Washington attorney, contacted two Supreme Court Justices regarding a case pending before the Supreme Court. The Post article, which consisted of excerpts from a new book about the Supreme Court entitled The Brethren, stated such out-of-court contacts with justices about pending cases are unethical.

In your letter of 21 December 1979, you stated your office, the Board on Professional Responsibility, has undertaken the investigation I recommended, and that I would be advised whether or not discipline is recommended by a hearing committee. You requested I treat confidentially your 21 December 1979 letter and any subsequent correspondence from you reporting a dismissal of the matter or the imposition of a confidential form of discipline. You stated that the rules governing your procedures require this confidentiality.

In your letter of 6 March 1980, you stated that: "We have completed our investigation of this matter and have been unable to establish that the contacts described in the book entitled The Brethren actually occurred, or that Mr. Corcoran otherwise sought to communicate with a Justice of the Court in a manner which could be considered a violation of a Disciplinary Rule." Your office therefore terminated its inquiry.

The careful language of your March 6 letter, coupled with the emphasis on confidentiality, raises a number of questions. When the Board on Professional Responsibility states it was "unable to establish that the contacts described in the book entitled The Brethren actually occurred," does that actually mean that a thorough investigation led the Board to conclude the story was unfounded? Did the Board actually contact or attempt to contact

the authors of the book, the authors' sources or those mentioned in the book as having been involved or knowledgeable of the alleged incidents? Your letter leaves open the possibility that the reason the Board was unable to establish that the contacts described in the book actually occurred might stem from a superficial review.

Furthermore, you stated that the District of Columbia Bar was unable to establish " ... that Mr. Corcoran otherwise sought to communicate with a Justice of the Court in a manner which could be considered a violation of a Disciplinary Rule." The statement leaves open the possibility that Mr. Corcoran may have in fact contacted members of the Supreme Court in a manner different than that reported in The Brethren, but that your disciplinary rules are drawn too narrowly to prohibit such contacts. Lastly, you are silent on the question of whether the District of Columbia Bar has referred this matter to the Supreme Court Bar for its investigation and consideration.

Based on the above, one might wonder whether the District of Columbia Bar Association's emphasis on confidentiality in the case is prompted more by a desire to isolate itself from further questions regarding its disciplinary process than it is over the concern for the individual involved. As you know the legal profession has been strongly criticized in many quarters because of a general perception that it is unwilling to discipline its own members. For this reason it is particularly important that the basis for the termination of the Board's inquiry be capable of withstanding scrutiny.

I believe the public is entitled to know that the District of Columbia Bar disputes the account of Mr. Corcoran's alleged contact with the two Supreme Court Justices as reported in The Brethren. In a letter to me dated December 19, 1979, Mr. Pickering, President of the District of Columbia Bar, stated that private contacts with judges relating to pending cases: " ... must be regarded seriously since they give the appearance of undue advantage and can impair public confidence in the legal profession and in the impartial administration of justice." The public is already aware of Mr. Corcoran's alleged misconduct from The Brethren. A 14 December 1979 Washington Post article, "Attorney Corcoran Faces Ethic Probe," made the public aware of the District of Columbia Bar's investigation of this matter. The only important aspect of this matter not known by the public is that the District of Columbia Bar has exonerated Mr. Corcoran - a fact that should not harm Mr. Corcoran.

Since my referral of the matter of Mr. Corcoran's alleged misconduct to the District of Columbia Bar has become public knowledge, I may be asked what action the District of Columbia Bar has taken. To keep the outcome of your investigation confidential will no doubt raise more questions.

I request you advise me promptly as to whether a disclosure of the outcome of your investigation would be in violation of any law, or if your request for confidentiality was made solely because the rules of the District of Columbia Bar call for investigatory proceedings to be confidential.

Sincerely,

H. G. Rickover

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

May 23, 1980

Mr. Leonard S. Janofsky, President
American Bar Association
1155 East 69th Street
Chicago, Illinois 60637

Dear Mr. Janofsky:

On December 11, 1979, I wrote to you regarding the reported ex parte communication between a prominent Washington lawyer and two Supreme Court Justices. In your response dated December 21, 1979, you stated:

> "In a profession that accepts responsibility for self-discipline, there must be a high level of attention to issues of professional ethics and a vigorous program of disciplinary enforcement. I would be pleased to discuss this subject and perhaps other areas of common interest with you at our mutual convenience when I am next in Washington."

While awaiting your next visit to Washington, I thought I should bring to your attention formally another problem which I believe detracts from the reputation of your organization. The specific issue involves the conduct of the Public Contract Law Section of the ABA.

In recent years, the Public Contract Law Section of the ABA has become essentially a forum for lawyers who specialize in contract claims against the Government to pursue their own special interests, as well as those of their clients – all in the name and prestige of the ABA. For example, the Public Contract Law Section, with the sponsorship and approval of the ABA, recently promoted a contract disputes bill that would have significantly strengthened the position of contractors and their lawyers in opposing the U. S. Government in future claims litigation.

The ABA-sponsored bill contained subtle loopholes which, for the first time, would have enabled Government agencies to settle claims by "horse trading", independent of the merits of the claim and without Congressional review. When I brought this to their attention, members of Congress properly deleted these loopholes from the Contract Disputes Act.

The ABA-sponsored bill applied a double standard – which always favored contractors. For example, under the ABA bill, contractors

would have 12 months or more to appeal an agency's Board decision, but the Government would have been allowed only 120 days to appeal. Congress revised the ABA bill to apply even-handed standards.

In addition to closing major loopholes in the ABA bill, Congress – over the opposition of your Public Contract Law Section – inserted provisions requiring contractors to certify the accuracy of their claims, and established strict sanctions against those who deliberately submitted false claims.

When Congress enacted the strengthened Contract Disputes Act, the ABA's Public Contract Law Section turned its efforts toward watering down the implementing regulations. In the January 1979 issue of the Public Contract Newsletter, the Chairman of the Section stated:

> "On balance, I believe the gains achieved by this legislation outweigh what many in our Section perceive to be serious shortcomings ... Many of these shortcomings can be overcome or lessened by the implementing regulations, and in that large task our concerned committees are busily engaged."

The influence of the Public Contract Law Section was apparent in the regulations the Office of Federal Procurement Policy (OFPP) issued in April 1980 to implement the Contract Disputes Act. The OFPP regulations reflect the Public Contract Law Section's efforts to reinstate concepts Congress had rejected in the ABA-sponsored contract disputes bill and to undermine safeguards Congress had added.

In addition to their efforts to water down the implementing regulations, several prominent members of the Public Contract Law Section, two of whom testified for the contract disputes bill on behalf of the ABA, have co-authored an article in which they state:

> "Neither the Disputes Act and Acquisition Act Certificates, nor the fraudulent claims provisions of Section 5, prevent you from making <u>imaginative</u> or <u>innovative</u> claims at any time." (My underlining.)

The authors recommend specific ways for contractors to get around some of the legal safeguards of the Contract Disputes Act. For example, the authors suggest:

a. Avoiding claims certification requirements by submitting a "request for equitable adjustment" instead of a "claim."

b. Frustrating Government access to data regarding the preparation of a claim by having the data prepared by, or at the direction of, an attorney, and then claiming attorney-client privilege.

c. Labeling as "matters of judgment" those portions of a claim which are not based on fact.

The conduct of the ABA's Public Contract Law Section with respect to the Contract Disputes Act demonstrates that the ABA no longer should be considered a professional organization, but a trade association through which the members – in this case, claims lawyers – seek to further their private interests. By endorsing the Public Contract Law Section's position on the Contract Disputes Act, the ABA's House of Delegates threw the weight of the legal profession behind the claims lawyers.

I personally doubt that if all of the ABA's membership understood what this small self-interested group is advocating, they would be in favor. Nor do I believe they would favor lending their names to causes promoted by small groups of lawyers who seek to "use" the ABA for their own selfish, anti-Government purposes. I have too high an opinion of the majority of your members to conceive otherwise. Regardless of whether or not the ABA Delegates understood what they were endorsing in the case of the Contract Disputes Act, the situation does not speak well for the ABA nor enhance its image as a professional society.

If the ABA wishes to improve the present poor public attitudes toward the legal profession, it should ensure that the various ABA segments, such as the Public Contract Law Section, refrain from using the ABA as a forum to promote their business interests. Specifically, the ABA should not be used to sponsor legislation aimed at enhancing the position of a small number of its members and their clients in litigation to the detriment of the Government. Nor should these special interests be permitted to use the ABA to promote legal theories or regulations which circumvent the obvious intent of the law. The ABA should instead direct its efforts to the very real problems that threaten to undermine our system of justice, e.g., the proliferation of frivolous lawsuits; abuses of Freedom of Information Act requests and discovery procedures; false claims and other forms of legal harrassment; excessive billings by attorneys; widespread lack of enforcement of the ABA's Code of Professional Conduct.

I would appreciate your looking into this matter and informing me whether you and your compatriots at the head of the ABA endorse the conduct of your Public Contract Law Section and its members with respect to the Contract Disputes Act. I would also like to know what action, if any, the ABA intends to take to remedy the situation. I would appreciate your reply to the issues raised in this letter at your early convenience.

Sincerely,

H. G. Rickover

Copy to:
Attorney General of the United States
General Counsel, Department of Defense
General Counsel, Department of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

2 December 1980

MEMORANDUM FOR THE SECRETARY OF THE NAVY

Subj: Former Navy lawyers flaunting their Navy experience and connections in soliciting legal business from Navy contractors

Encl: (1) Lewis, Kominers and James letter dated April 14, 1980
(2) My letter to the President, District of Columbia Bar dated 2 December 1980

1. I recently received anonymously in the mail a copy of enclosure (1) which appears to be a letter from the law firm of Lewis, Kominers and James. In this letter Mr. E. Grey Lewis solicits business from General Ship Corporation – a firm that does ship repair work for the Navy. The letter is on the law firm's letterhead; the signature, "Grey Lewis," conforms with that on documents signed by Mr. Lewis when he was General Counsel for the Navy several years ago. The letter appears to be authentic.

2. Enclosure (1) explains that all three partners of the firm previously held key positions in the Navy's legal organization. Mr. Lewis was Navy General Counsel; Mr. Kominers, Naval Sea Systems Command Deputy Counsel for Claims and Litigation, and Legal Member of the Navy Claims Settlement Board; Mr. James, Counsel, Naval Sea Systems Command. Mr. Lewis states:

> " ... we have an understanding of today's nuclear and shipbuilding Navy, especially its procurement policies and contracting practices, that is not readily available elsewhere.
>
> "We have intimate knowledge of the Navy's organization and its players, including the Naval District organizations in which the periodic ship overhaul and repair contracts are awarded."
>
> * * *
>
> " ... our firm is in a unique position of experience in shipbuilding and repair matters which is so helpful in understanding and solving the problems which your company encounters in dealing with the Government. We are capable of representing firms in the full gamut of commercial matters – assistance in bid preparation and contract negotiation, ongoing contract administration matters such as changes, terminations and subcontractors issues as well as in disputes and litigation."

3. I recall, when Mr. Lewis was the Navy's General Counsel, the marked difficulty in getting him to take a firm stand against companies making claims against the Government. He always was reluctant to do so; he delayed taking action and never seemed to put his heart and soul into the problem. Nevertheless, I was still surprised and disappointed that he now offers his services and those of his associates to represent companies in matters against the Navy.

4. Mr. Lewis' letter serves as a reminder and warning of what many who have been in Government service have done; namely spend much of their adult lives in Government jobs, only later to use their inside knowledge against the Government – the very organization that trained and nurtured them. It is the same as if a son, having been nurtured and educated by his parents, then uses against them the knowledge he has gained of their way of living.

5. The letter from Lewis, Kominers and James is not "illegal" in the strict sense of the word. No doubt it is couched so as not to violate the Bar Association's Code of Professional Conduct. However, by all standards of decency and propriety, it is unethical. Further, it casts the Navy in a bad light. What are taxpayers and members of Congress to think when former Navy employees solicit legal business on the basis that they have an "in" with the Navy and with certain named individuals?

6. I have sent enclosure (2) to the District of Columbia Bar since, in January 1980, that organization's Legal Ethics Committee concluded that the lack of an adequate Disciplinary Rule in this area "leaves former Government officials free to publicly invite retainers which involve litigation against former clients." The Legal Ethics Committee also stated it has "asked its Code Subcommittee to consider the desirability of a specific Disciplinary Rule dealing with such situations." Based on past experience with that organization, and recognizing their own special interests, I expect nothing will be done by them within the next century or so.

7. The Navy, however, should not rely on bar associations to remedy the situation. It needs to ensure that Messrs. Lewis, Kominers and James and others of their ilk are not able to exploit, or to give the impression of exploiting, in behalf of private clients, their "connections" and "special knowledge" gained from past Navy service. In view of your official responsibilities, I recommend that you disseminate enclosure (1) to those involved in the contractual, legal or production aspects of the Navy's shipbuilding, conversion and repair program, and instruct them to have no dealings with anyone from the Lewis, Kominers and James law firm, or with other former Navy employees who now represent other contractors or law firms under similar circumstances.

8. I would appreciate being informed of what action you take in this matter.

H. G. Rickover

Copy to:
Deputy Secretary of Defense
General Counsel, Department of Defense
Assistant Secretary of the Navy
(Manpower, Reserve Affairs and
Logistics)
General Counsel of the Navy
Chief of Naval Operations
Chief of Naval Material
Commander, Naval Sea Systems Command
Deputy Commander for Contracts, Naval
Sea Systems Command
Counsel, Naval Sea Systems Command

LEWIS, KOMINERS & JAMES
COUNSELORS AT LAW
SUITE 350, 2020 K STREET, N.W.
WASHINGTON, D.C. 20006
(202) 293-5353

April 14, 1980

Mr. J. Douglas Brown
President
General Ship Corporation
400 Border Street
East Boston, MA 02128

Dear Mr. Brown:

I am taking the liberty of writing to introduce myself and our recently established law firm. I was the General Counsel of the Navy for four years under now Senator John Warner, J. William Middendorf and briefly Graham Claytor, who is presently the Deputy Secretary of Defense. David James held the position of Command Counsel of the Naval Sea Systems Command (NAVSEA), which is the top legal job at NAVSEA. As you know, NAVSEA has jurisdiction over all shipbulding/overhaul and repair contracts. Jeffrey Kominers was the Deputy Command Counsel at NAVSEA for claims and litigation as well as the Legal Member of the Navy's Claims Settlement Review Board. I believe that between the three of us we have an understanding of today's nuclear and shipbuilding Navy, especially its procurement policies and contracting practices, that is not readily available elsewhere.

We have intimate knowledge of the Navy's organization and its players, including the Naval District organizations in which the periodic ship overhaul and repair contracts are awarded. We have also dealt over the years with NAVSEA's Supervisor of Shipbuilding and Repair (SUPSHIP) organizations. We have put together shipbuilding development and construction program plans and their implementing contracts.

Thus our firm is in a unique position of experience in shipbuilding and repair matters which is so helpful in understanding and solving the problems which your company encounters in dealing with the Government. We are capable of representing firms in the full gamut of commercial matters -- assistance in bid preparation and contract negotiation, ongoing contract administration matters such as changes, terminations and subcontractors issues as well as in disputes and litigation. We can also assist a firm in its ongoing business development efforts and handle any needed congressional liaison work.

I hope my writing directly does not offend you but your work so parallels our interests that I thought you might like to know of our capabilities. If we can ever be of any assistance to General Ship, please let me know.

Sincerely yours,

E. Grey Lewis

EGL:gf

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

2 December 1980

Mr. Stephen J. Pollak, President
The District of Columbia Bar
1426 H. Street, N.W.
Suite 840
Washington, D.C. 20005

Dear Mr. Pollak:

On numerous occasions I have expressed concern about the conflict of interest situation which arises when former Government lawyers pursue matters in private practice in which they were involved while in the Government. For example, in late 1978 I brought to the attention of the District of Columbia Bar, the case of a former Navy lawyer who placed an advertisement in the Wall Street Journal touting his contract claims experience as a Navy lawyer and soliciting clients who desired to submit claims against the Government.

The District of Columbia Bar Ethics Committee considered the conduct of the lawyer to be inconsistent with the Ethical Considerations of the ABA's Code of Professional Responsibility, but took no disciplinary or corrective action because the lawyer had not broken a Disciplinary Rule. The Committee concluded, however, that the lack of an adequate Disciplinary Rule in this area "leaves former Government officials free to invite retainers which involve litigation against former clients" and the Committee therefore "asked its Code Subcommittee to consider the desirability of a specific Disciplinary Rule dealing with such situations."

Recently I received a copy of a letter dated April 14, 1980, that a law firm of former Navy lawyers used to solicit business from a Navy ship repair contractor. I have enclosed a copy of this letter as another example of the need for the District of Columbia Bar to act responsibly in precluding former Government lawyers from soliciting clients who want to take legal action against the Government.

The author of the letter identifies himself and his partners of his recently established law firm as former high ranking lawyers of the Navy Department "in a unique position of experience in shipbuilding and repair matters which is so helpful in understanding and solving the problems which your company encounters in dealing with the Government." He cites by name three former Secretaries of the Navy to whom he previously reported. One of these former Secretaries is the present Deputy Secretary of Defense. Another is presently a U.S. Senator. The letter touts the partners' "intimate knowledge

of the Navy's organization and its players, including the Naval District organizations in which the periodic ship overhaul and repair contracts are awarded." The letter also states that the partners "have put together shipbuilding development and construction program plans and their implementing contracts," and are "capable of representing firms in the full gamut of commercial matters" – including "disputes and litigation."

I recommend that the District of Columbia Bar promptly investigate this matter to determine the following:

1. Is the enclosed letter authentic?

2. Did the members of this firm send similar letters to other Navy contractors?

3. Is solicitation of business from a potential client improper when the solicitation flaunts the partner's "intimate knowledge" of a former client – and nearly all aspects of the former client's legal affairs, including claims defense procedures?

4. Is the citation by name of present Government officials improper?

5. Is disciplinary or corrective action required as a result of this letter?

Public opinion of the legal "profession" is low. One national poll found lawyers ranked below garbage collectors in public approval and that only a small part of the public has confidence in law firms. The image of the legal profession certainly will not be improved as long as the profession allows lawyers, in soliciting business, to exploit their inside knowledge of former clients.

I trust that in this specific case the District of Columbia Bar will rise above its previous inaction. This can provide an opportunity for your Association to demonstrate that there is at least one Bar Association willing to place the public interest ahead of the financial welfare of some of its members.

Please inform me of the results of your investigation. I trust this will not take more than a year as was the case when I wrote to the President of the District of Columbia Bar in October 1978 concerning an advertisement in the Wall Street Journal by a former Navy lawyer. Such delay did not speak well for an organization that prides itself on prompt action for the public weal.

Sincerely,

H. G. Rickover

Enclosure

Copy to:
General Counsel, Department of Defense
General Counsel of the Navy

Stephen J. Pollak
President

James J. Bierbower
President-Elect

Francis D. Carter
Secretary

Collot Guerard
Treasurer

The District of Columbia Bar
1426 H STREET, N.W., EIGHTH FLOOR WASHINGTON, D.C. 20005
Bar Office: 638-1500 — Public Service Activities: 638-1509
Continuing Legal Education and Communications: 638-4799

J. David Ellwanger
Executive Director

David B. Dorsey
Director - Administration and Finance

Zona F. Hostetler
Director - Public Service Activities

Jane Ottenberg
Director - Continuing Legal Education and Communications

Myrtle D. Washington
Director - Professional Service Activities

December 19, 1980

Admiral H.G. Rickover
Department of the Navy
Naval Sea Systems Command
washington, D.C. 20362

Dear Admiral Rickover:

I have acted to bring the questions which you raise in your letter of December 2, 1980, before the Board on Professional Responsibility and the Bar's Legal Ethics Committee. The Board on Professional Responsibility is a separate Court-appointed Board which handles all disciplinary matters and is, in my judgment, the appropriate body to evaluate the conduct of the former Navy lawyers which your letter calls to my attention.

I have also communicated today with the Chairman of our Legal Ethics Committee and asked him if he would advise you of the major efforts which this Bar has made to strengthen the rules respecting the conduct of former Government attorneys insofar as they or their firms may undertake representation of clients in areas which they touched while employed by the Government.

I enclose for your information copies of my letters to the Board and Committee chairpersons.

I appreciate your bringing these questions to my attention. I am sorry if the record made in one prior matter did not meet your standards. The Board on Professional Responsibility and our Legal Ethics Committee can only operate within the Disciplinary Rules which are issued by the District of Columbia Court of Appeals. As you may be aware, that Court has before it amendments to the Rules respecting the limitations on the conduct of former Government attorneys and their law firms in representing clients before their old agencies. These changes are known as the "Revolving Door" amendments. The Court has not as yet acted on the matter, and you may wish to communicate your views to that Court.

Sincerely yours,

Stephen J. Pollak
President

SJP/rsl

Enclosures

Stephen J. Pollak
President

James J. Sterbower
President-Elect

Francis D. Carter
Secretary

Collot Guerard
Treasurer

J. Davis Ebenezer
Executive Director

David B. Dorsey
Director - Administration and Finance

Zona F. Hostetler
Director - Public Service Activities

Jane Ottenberg
Director - Continuing Legal Education and Communications

Myrle D. Washington
Director - Professional Service Activities

The District of Columbia Bar
1426 H STREET, N.W., EIGHTH FLOOR WASHINGTON, D.C. 20005
Bar Office: 638-1500 — Public Service Activities: 638-1509
Continuing Legal Education and Communications: 638-4799

December 19, 1980

Lawrence J. Latto, Esq.
Chairman
The Board on Professional
Responsibility
District of Columbia Court
of Appeals
515 Fifth Street, N.W.
Building A, Room 127
Washington, D.C. 20001

Dear Mr. Latto:

I have received a letter from Admiral H.G. Rickover of the Department of the Navy, Naval Sea Systems Command, bringing to my attention a copy of a letter dated April 14, 1980, which, according to the Admiral, "a law firm of former Navy lawyers used to solicit business from a Navy ship repair contractor." Admiral Rickover cites the letter as "another example of the need for the District of Columbia Bar to act responsibly in precluding former Government lawyers from soliciting clients who want to take legal action against the Government." He then asks for an investigation into the matter which would address at least five specific questions which he details.

Under the Rules Governing the District of Columbia Bar, questions whether the conduct of attorneys violates the Disciplinary Rules are made the responsibility of the Board on Professional Responsibility. Accordingly, I am referring Admiral Rickover's letter and its enclosure to you for consideration and, as appropriate, action.

I am also sending the Admiral's communication to Robert Jordan, Chairman of the Legal Ethics Committee of the D.C. Bar, with a request that Mr. Jordan advise the Admiral of the efforts which have been made by the Legal Ethics Committee and the D.C. Bar respecting the "Revolving Door" rules.

Finally, you will note that Admiral Rickover states in paragraph one of his letter that he brought to the attention of the D.C. Bar in 1978 the case of a former Navy lawyer who placed an advertisement in the Wall Street Journal touting his contract claims experience as a Navy lawyer and soliciting clients who desire to submit claims against the Government. It appears to me that the Admiral believes that the Board on Professional Responsibility considered the conduct of the lawyer but took no action. I would appreciate it if you could advise me of any information concerning this case which may appropriately be made available to the President of the D.C. Bar. I will be making the same inquiry of Mr. Jordan.

Thank you for your consideration of these matters.

Sincerely yours,

Stephen J. Pollak
President

SJP/rsl

Enclosures

cc: Fred Grabowsky, Esq.
Admiral H.G. Rickover

Stephen J. Pollak
President

James J. Bierbower
President-Elect

Francis D. Carter
Secretary

Collot Guerard
Treasurer

[illegible]
Executive Director

David B. Dorsey
Director - Administration and Finance

Zona F. Hostetler
Director - Public Service Activities

Jane Ottenberg
Director - Continuing Legal Education and Communications

Myrle D. Washington
Director - Professional Service Activities

The District of Columbia Bar
1426 H STREET, N.W., EIGHTH FLOOR WASHINGTON, D.C. 20005
Bar Office: 638-1500 — Public Service Activities: 638-1509
Continuing Legal Education and Communications: 638-4799

December 19, 1980

Robert E. Jordan, III, Esq.
Steptoe & Johnson
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dear Bob:

Admiral Rickover has written to me raising questions concerning the conduct of certain former Navy lawyers. I enclose a copy of his letter of December 2, 1980, and its enclosure. Also enclosed is a copy of my letter referring the Admiral's letter to Lawrence J. Latto, Chairman of the Board on Professional Responsibility, for consideration by that Board.

I would appreciate it if you would advise Admiral Rickover of the efforts which the Legal Ethics Committee and the D.C. Bar Board have made respecting the Disciplinary Rules governing the conduct of former Government lawyers and the law firms with which they may associate in respect to their prior federal clients. Additionally, should you have any information concerning the 1978 case which Admiral Rickover details in the first two paragraphs of his letter, I would appreciate receiving it.

Finally, if the Legal Ethics Committee has any information concerning the matter referred to in the first paragraph of the Admiral's letter, I would appreciate being advised of it.

Thank you for your consideration of these matters.

Sincerely,

Stephen J. Pollak

Enclosures
cc: Admiral H.G. Rickover

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
22 December 1980

Mr. William R. Smith, Jr., President
American Bar Association
1155 East 60th Street
Chicago, Illinois 60637

Dear Mr. Smith:

In my May 23, 1980 letter to Mr. Janofsky, former President of the American Bar Association (ABA), I pointed out that members of the ABA's Public Contract Law Section were using the ABA to pursue their own special interests under the guise of a professional society. Specifically:

a. The Public Contract Law Section drafted a bill filled with loopholes and special provisions that would substantially strengthen the position of contractors and their lawyers in pursuing contract claims against the Government. The Section obtained the ABA's endorsement and vigorously lobbied Congress for enactment.

b. The Public Contract Law Section lobbied strongly, but unsuccessfully, against amendments which eliminated loopholes and discouraged submission of false claims.

c. Shortly after Congress enacted the amended bill, the Chairman of the Public Contract Law Section announced in the January 1979 issue of the Public Contract Newsletter:

> "On balance, I believe the gains achieved by this legislation outweigh what many in our Section perceive to be serious shortcomings ... Many of these shortcomings can be overcome or lessened by the implementing regulations, and in that large task our concerned committees are busily engaged."

d. The Office of Federal Procurement Policy (OFPP) subsequently issued draft implementing regulations which resurrected concepts sought by the Public Contract Law Section in the ABA version of the bill, but specifically deleted in the statute enacted by Congress.

Since the Public Contract Law Section's activities were aimed at improving the lot of claims lawyers and their clients rather than serving the public, I asked Mr. Janofsky to look into this matter and inform me whether he and others at the head of the ABA endorse the Public Contract Law Section's conduct with regard to the Contract Disputes Act and what action, if any, the ABA intends to take to remedy the situation.

Mr. Janofsky answered my letter on July 17, 1980, shortly before his term as ABA President expired. He forwarded a report prepared

for him by the new Chairman of the Public Contract Law Section, Mr. O. S. Hiestand – a former Government lawyer, now partner in a law firm which represents contractors against the Government.

Since Mr. Hiestand is probably one of the claims lawyers' most energetic lobbyists, it is not surprising that he gives the Public Contract Law Section a clean bill of health. He reports:

> "While the Section was significantly involved in the development of the Contract Disputes Act, and the OFPP implementing regulations, there are no indications that representatives of ABA acted improperly or served self-interests under the guise of ABA. Efforts to reform the remedies system for Federal contracts has been a priority item of the Section for many years. ... The subsequent effort and talent devoted to this effort by members of the Public Contract Law Section have been in the best tradition of public service by members of the legal profession."

What does surprise me is that your predecessor, Mr. Janofsky, would simply turn over the task of reviewing the propriety of the Public Contract Law Section's activities to the Chairman of that Section – a Chairman who is becoming widely known as a spokesman for claims lawyers. I am further disappointed that Mr. Janofsky would then cite Mr. Hiestand's report as basis for concluding that the Public Contract Law Section's activities with regard to the Contract Disputes Act were "balanced," and "in the public interest."

This is exactly the problem I raised with Mr. Janofsky – the ABA "rubber stamping" the work of the claims lawyers in the Public Contract Law Section, thus enabling the claims lawyers to promote their own business interests under the cloak of what purports to be a professional society.

As further evidence that Mr. Janofsky missed the point – whether deliberately or otherwise – his September 24, 1980 letter to me invited my attention to a speech the OFPP Administrator made to the Public Contract Law Section at the ABA convention last summer. The speech contained a paragraph praising the Section for "painstakingly" reviewing each page of OFPP's draft Federal Acquisition Regulations and thanking the Section, and Mr. Hiestand by name, for their "overall efforts to assist OFPP." Mr. Janofsky pointed to that speech as an indication that the Public Contract Law Section is performing a public service.

Having seen a number of Public Contract Law Section positions show up in draft OFPP procurement regulations, it did not surprise me to find words of praise for Mr. Hiestand and his Public Contract Law

Section in the Administrator's speech. Nor was I surprised to learn recently that the OFPP official who supervised the drafting of Contract Disputes Act regulations was subsequently hired by Mr. Hiestand's law firm. I have come to expect such things wherever the Public Contract Law Section is involved.

I doubt that any other group, in or out of Government, has involved itself as much with reviewing OFPP regulations as has the Public Contract Law Section. In fact, that is the problem. The claims lawyers of the Public Contract Law Section have been able to exercise considerable influence in Government procurement matters. The subjects these lawyers deal in are arcane, and the legal implications of their "helpful" suggestions and suggested draft language are not always evident, even among those who work in the field. Their "contributions" however seem always to be in the direction of creating advantages for claims lawyers and their clients in disputes against the Government. Recently, for example, Mr. Hiestand, on behalf of the Public Contract Law Section, petitioned the Office of Federal Procurement Policy to overturn Department of Defense regulations and establish a policy that would permit contractors to stop work on defense contracts in certain contract disputes. The effect of the recommended change would be to increase contractors' leverage in contract disputes with the Government by holding important work hostage to the contractors' demands.

In his report to Mr. Janofsky, Mr. Hiestand contends that the Section's efforts with regard to the Contract Disputes Act are simply attempts to reform the remedies system for Federal contracts along the lines recommended by the Commission on Government Procurement. Since Mr. Hiestand was formerly counsel to the Commission on Government Procurement, he surely must be aware that the causes the Public Contract Law Section have been championing go far beyond the Commission's recommendations. For example, the Commission never recommended authorizing Government agencies to compromise or "horse trade" claims; denying the Government the right to appeal agency board decisions; nor facilitating work stoppages on defense contracts. Moreover, I doubt the Commission on Government Procurement would have opposed, as the Public Contract Law Section has opposed, Congressional efforts to curb the submission of false and inflated claims by requiring claims certification and strict sanctions against false claims.

In responding to criticism that the Public Contract Law Section is being run for the benefit of claims lawyers, Section officials frequently point to a varied membership and urge that more Government attorneys join the Section to participate if the Government interest is not being represented adequately. But why should Government attorneys have to join the Public Contract Law Section in order to ensure that ABA recommendations regarding public contract law will be based on the public good?

Government agencies routinely publish proposed procurement regulations for public comment. Claims lawyers, like any other special interest group, have a right to submit comments and petition the Government in their own behalf. But, it is wrong for claims lawyers to pursue these efforts under the pretense of a public service by the ABA.

I am rapidly coming to the conclusion that the lofty statements of senior ABA officials about wanting to restore public confidence in the legal profession are just words for public relations purposes. In the hope, however, that you might take a more responsible attitude than your predecessors toward this problem, I recommend that you designate respected members outside the Public Contract Law Section to determine:

a. The extent to which the activities of that Section are dominated by claims lawyers.

b. The extent to which the positions promoted by the Section are designed primarily to benefit claims lawyers and their clients in contract disputes with the Government.

c. The extent to which the ABA House of Delegates or other ABA review groups were made fully aware of the cleverly conceived loopholes embodied in the proposed Contract Disputes legislation they endorsed in behalf of the ABA and the effect these would have on the taxpayer.

d. The extent to which senior officers of the ABA were aware of and endorsed the Public Contract Law Section's activities in lobbying the OFPP for regulations more favorable to claims lawyers.

e. The extent to which senior officers of the ABA knew and approved of the hiring by Mr. Hiestand's law firm of a key OFPP official in charge of drafting Contract Disputes Act regulations, after this work was essentially completed.

f. The extent to which they were aware of and approved Mr. Janofsky's turning over to the Chairman of the Public Contract Law Section the job of investigating that very Section. Did they agree with Mr. Janofsky's conclusions?

In conclusion, I invite your attention to the warning Chief Justice Burger issued in a speech last summer concerning the legal profession. He said:

> "If we ever succumb to the idea that the organized bar is a body established for the mutual protection of its own members, we will not deserve – and we will not <u>have</u> – the confidence of the American Public."

I would appreciate receiving a prompt and substantive reply to this letter. On the other hand, if you and your ABA House of Delegates are not concerned with the problems I have raised, please say so. There is no need to go to the trouble that Mr. Janofsky and Mr. Hiestand did to create the impression of action, simply for "window dressing."

Sincerely,

H. G. Rickover

Attachments:
My letter to Mr. Janofsky dtd May 23, 1980
Mr. Janofsky's letter to me dtd July 17, 1980
Mr. Janofsky's letter to me dtd Sept. 24, 1980

Copy to:
Chief Justice of the United States
Attorney General of the United States
Director, Office of Management & Budget
General Counsel, Department of Defense
General Counsel of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command
Counsel, Naval Sea Systems Command
Deputy Commander for Contracts, Naval Sea Systems Command

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

24 December 1980

The Honorable James T. McIntyre, Jr.
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. McIntyre:

In enclosure (1) I described how claims lawyers of the Public Contract Law Section exert influence in the drafting of the Contract Disputes Act implementing regulations promulgated by the Office of Federal Procurement Policy (OFPP). You responded by enclosure (2) in which you concluded that OFPP's Disputes Act policy guidance "... strikes a balance between the rights of the contractor in obtaining a speedy and just disposition of claims, and the rights of the Government in having bonafide and substantiated claims submitted to it for consideration." Enclosure (2) did not specifically address the subject of the influence the Public Contract Law Section appears to be exerting in OFPP.

Enclosure (3) is a letter I recently sent to the current President of the American Bar Association (ABA). Among other points, my letter commented upon the close relationship between the Public Contract Law Section and OFPP. Specifically, enclosure (3) points out that:

1. The OFPP Administrator, in addressing the Public Contract Law Section at the ABA convention last summer, praised Section members for "painstakingly" reviewing each page of OFPP's draft Federal Acquisition Regulation and thanked Section members for their "overall efforts to assist OFPP." The former President of the ABA then forwarded me a copy of the OFPP Administrator's remarks to substantiate his contention that the Public Contract Law Section, in its work with OFPP, is acting only in the public interest.

2. The Public Contract Law Section's contributions in the drafting of OFPP regulations seem always in the direction of creating advantages for claims lawyers and their clients in disputes against the Government.

3. The OFPP Contract Disputes Act regulations resurrected concepts sought by the Public Contract Law Section in promoting their version of the Contract Disputes Act, but specifically deleted in the statute enacted by Congress. The senior OFPP

official who supervised the drafting of these regulations subsequently left OFPP to take a job with the law firm in which Mr. O. S. Hiestand is a partner. Mr. Hiestand, in addition to being Chairman of the Public Contract Law Section, has probably been that Section's most active lobbyist in matters pertaining to the Contract Disputes Act.

I believe that, based on your previous response – which was probably drafted by OFPP – you greatly underestimate the influence being exerted by the Public Contract Law Section in OFPP procurement policy decisions. I doubt that you are aware of all the events described in enclosure (3). I am therefore forwarding that letter to you with the recommendation that you conduct an independent review of the involvement of the Public Contract Law Section in your OFPP operation.

I further recommend that before you step down as Director, Office of Management and Budget, you establish procedures to ensure OFPP officials do not avail themselves of informal "staff support" by special interest groups such as the Public Contract Law Section, which has proved itself to be little more than a front for claims lawyers. Whatever contributions special interest organizations such as this desire to make to the Government's regulation writing process should be submitted formally, with copies distributed to all affected Government agencies and made available to the public. In that way at least the scope of the Public Contract Law Section's efforts in the regulation writing process will be visible and those concerned with protecting the public interest might have a better chance of doing so.

I would appreciate receiving your response to this letter.

Respectfully,

H. G. Rickover

Encl:
(1) My letter to you dated May 30, 1980
(2) Your letter to me dated July 29, 1980
(3) My letter to William R. Smith dated 22 December 1980

Copy to:
General Counsel of the Navy
Commander, Naval Sea Systems Command
Counsel, Naval Sea Systems Command
Deputy Commander for Contracts, Naval Sea Systems Command

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

FEB 4 1981

Admiral H. G. Rickover, USN
Department of the Navy
Naval Sea Systems Command
Washington, DC 20362

Dear Admiral Rickover:

Thank you for your letter of December 24, 1980, wherein you advised of your continuing concern regarding "influence" by members of the Public Contract Law Section of the American Bar Association (ABA) upon the policy guidance promulgated by the Office of Federal Procurement Policy (OFPP), and recommended the establishment of formal procedures to insure that the guidance issued results from a full, free, and open exchange of ideas among all interested parties.

All procurement policy guidance issued by OFPP policy letters is developed in accordance with the provisions of Section 510 of the OMB Manual entitled "Formal Guidance Documents." A copy of Section 510 is enclosed for your information. Proposed policy letters are coordinated in draft with the OMB General Counsel, each affected OMB unit, the Assistant Directors for Administration and for Management and Policy, and with affected Executive Agencies. To insure maximum exposure, proposed policy letters are distributed to a broad based OFPP constituency in the public and private sectors and are published in the Federal Register for a 60-day public comment period. Concurrent with publication, the proposed policy letter is sent to the Chairman of the Senate Governmental Affairs Committee and the Chairman of the House Governmental Operations Committee pursuant to requirements of the OFPP Act.

When review and consideration of the comments are completed, the policy letter is drafted, with appropriate revisions, and recirculated within OMB and to affected Executive Agencies. Upon completion of this coordination, the final policy, along with an explanation of significant changes, is published in the Federal Register and concurrently mailed to the Heads of Executive Departments and Establishments.

Particular care was exercised by OFPP in the development of Policy letter 80-3, the regulatory guidance in implementation of the Contract Disputes Act, to adhere to the above-detailed procedures. The comments of all interested parties were taken into consideration in drafting this policy letter. The American Bar Association is one of the many organizations, private and public, whose comments were considered to achieve a balance between interests of the Federal Government and the private sector in promulgation of this guidance.

Again, thank you for your concern and your support for an improved Government contracting environment.

Sincerely,

Karen Hastie Williams

Karen Hastie Williams
Administrator

Enclosure

FEB 4 1981

Section 510: FORMAL GUIDANCE DOCUMENTS

510-1. Purpose.

This section prescribes procedures and assigns responsibilities for preparing, issuing, and maintaining the formal documents (directives) by which OMB provides guidance to or obtains information from Federal agencies.

510-2. Objectives.

The aim of these procedures and responsibilities is to supply necessary guidance to Federal agencies in a system of documents that are carefully composed, readily understood, adequately supported, easily referenced, and current. It is the further aim to assure that timely and appropriate internal procedures are established for OMB staff activities that result from directives.

510-3. Definitions. A directive is a written issuance that uses OMB's authority to give direction or instructions of general applicability to Federal agencies, and may be in any of the following forms:

a. A Circular is a directive communicating significant governmentwide policy of a continuing nature.

b. A Bulletin is a directive communicating guidance that is transitory in nature or that requires one-time action by the agencies.

c. A Memorandum to Heads of Executive Departments and Establishments is used to announce temporary policy emphases or to remind agencies of existing policies.

d. A Federal Procurement Policy Letter is a directive of a continuing nature issued under the authority of the Administrator for Federal Procurement Policy.

e. A Transmittal Memorandum transmits a change to or rescinds an existing Circular, Bulletin, or Federal Procurement Policy Letter.

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f. A Regulation is a formal rule issued by OMB, which may or may not be promulgated under an explicit statutory provision, that governs the operations of a Federal program or function. Regulations may cover Federal procurement, management, financial assistance or similar area.

510-4. Responsibilities.

a. The division originating any directive is responsible for:

(1) Making an initial determination on the need for and type of directive to be issued, including any need to codify the directive in the Code of Federal Regulations;

(2) Assuring that the reporting and recordkeeping requirements that will be imposed on agencies are the minimum needed to fulfill OMB's responsibilities;

(3) Writing the directives and accompanying instructions in clear and concise English;

(4) Providing necessary materials and coordination in regard to:

(a) Executive Order No. 12044 (see Section 510-6.a.);

(b) National Archives and Records Service reporting (See Section 510-6.b.);

(c) Consultation with unions (see Section 510-6.c.);

(d) Intergovernmental consultation (see Section 510-6.d.); and,

(e) Policies affecting assistance programs of two or more departments or agencies (see Section 510-6.e.).

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(5) Ensuring that each applicable step in the procedures detailed in Sections 510-5 and 510-6, below, is carried out;

(6) Providing, either directly or through OMB units responsible for individual agencies, information and interpretation to agency representatives after the directive has been issued, including the issuance of supplemental guidance conforming to the directive already issued; and

(7) Regularly reviewing the directive to see that it is up-to-date, and preparing revisions as necessary.

b. The Assistant to the Director for Administration is responsible for:

(1) Advising the Director on the need for a directive to be issued;

(2) Assuring that all directives meet the standards of content and format discussed below and are written clearly and concisely;

(3) Assuring that applicable administrative requirements are met in regard to:

(a) Executive Order No. 12044;

(b) National Archives and Records Service reporting;

(c) Consultations with unions;

(d) Intergovernmental consultation; and,

(e) Multi-agency assistance programs.

(4) Issuing quarterly a complete index of all formal OMB guidance currently in effect and cross-referenced to internal instructions;

(5) Arranging for periodic reviews of OMB's directives to be made by the responsible divisions and for these divisions to make recommendations to the Director on whether the directives are still needed and what revisions, if any, are needed; and

(6) Recommending to the Director whether there is a need to codify the directive in the Code of Federal Regulations.

c. For all OMB directives except those of the Office of Federal Procurement Policy (OFPP) the Assistant to the Director for Administration is responsible for:

(1) Assigning the appropriate control number to each directive (see Attachment A);

(2) Maintaining current mailing lists for each type of directive;

(3) Assuring that copies of directives are distributed promptly;

(4) Maintaining the official historical file on all directives.

d. For all OFPP directives the Administrator for Federal Procurement Policy is responsible for:

(1) Assigning the appropriate control number to each directive (see Attachment A);

(2) Maintaining current mailing lists for each type of directive;

(3) Assuring that copies of directives are distributed promptly;

(4) Maintaining the official historical file on all directives;

(5) Ensuring that all OFPP directives comply with the procedures in 510-6f.

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e. The General Counsel is responsible for:

(1) Ensuring that all proposed directives are consistent with existing statutes, Executive Orders, or other regulations having the effect of law; and

(2) Ensuring that all necessary statutory requirements and relationships are appropriately referenced and properly cited.

510-5. Procedures.

General procedures. The following procedures are to be observed for preparing and issuing all directives except those of the Office of Federal Procurement Policy, which are covered in 510-6f. Additional instructions for particular types of directives are given in Section 510-6.

a. The responsible division determines the need for the directive and develops its contents and any other material needed, and performs any necessary coordination in regard to the responsibilities outlined in Section 510-4. Any request for written information from or instructions to ten or more agencies must be in the form of a formal directive.

b. Before preparing a final draft, the originating division consults with each unit in OMB likely to be affected by the directive and with the Assistant to the Director for Administration concerning the review outlined in Section 510-4.b. The division also consults with affected agencies when appropriate. When a preliminary draft of the proposed directive is prepared, it should be circulated to affected units and the Assistant to the Director.

c. The originating division prepares an Abstract of Correspondence that includes at least the following information:

(1) The purpose of the proposed directive;

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(2) The additional workload to be imposed on OMB, Federal agencies, and others by the directive, and an outline of the justification for such.

(3) Identification of the agencies and OMB units consulted during the preparation of the proposed directive, in addition to those appearing on the list of concurrences.

(4) Any related issues the Director should be aware of.

d. The final document should be routed to the Deputy Director and Director through:

(1) The head of any OMB division or office that shares responsibility for the directive (including the Associate Director for Management and Regulatory Policy for directives that affect assistance programs);

(2) The General Counsel;

(3) The Associate Director and Executive Associate Director or other senior management officials to which the originating division reports; and

(4) The Assistant to the Director for Administration.

Simultaneously, information copies will be sent to:

(5) The Assistant to the Director for Public Affairs (in all cases);

(6) The Assistant Director for Legislative Reference (when legislative matters are involved);

(7) The Assistant to the Director for Civil Rights (when civil rights matters are involved); and

(8) The head of any OMB division or office having a substantive interest in the guidance provided by the directive.

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e. The originating division prepares in clear and concise English a Budget Procedures Memorandum or other type of instruction to inform OMB personnel of the actions on their part directed or implied by the directive. The Budget Procedures Memorandum or other instruction should accompany the final issuance.

f. When the Director or Deputy Director has signed the document, it is given to the Budget and Management Officer for dating, assignment of a control number, reproduction, and distribution. The internal guidance prepared in step (e) will be distributed within OMB at the same time as the new directive when possible, or as soon thereafter as possible when it cannot accompany the directive. If the BPM cannot accompany the proposed directive, the abstract of correspondence should so state and indicate the date when such internal guidance will be issued.

510-6. Additional Procedures in Regard to Certain Directives

The following are special requirements in regard to certain directives.

a. Executive Order No. 12044. A directive falling within the requirements of Executive Order No. 12044, Improving Government Regulations, is one that is likely to affect:

(1) The existing procedures by which State or local governments contribute to or participate in the development of Federal policy;

(2) The nature and scope of information collected by Federal agencies from non-Federal respondents;

(3) The nature and scope of information provided by agencies of the Federal government under the Privacy Act;

(4) The standards by which agencies establish requirements associated with grants, contracts, cooperative agreements, or other forms of financial assistance.

Excluded from these requirements, however, are directives that outline procedures to be followed for the President's budget and legislative programs, or for matters affecting only the internal functions and management of Federal agencies. Coverage of Federal Procurement Policy issuances shall be determined by the OMB Director, in consultation with the Administrator, OFPP, the Assistant to the Director for Administration, and the Associate Director for Management and Regulatory Policy. (See Section 510-6.f.)

At the time work is initiated on such a new or revised directive (Circular or Bulletin) the responsible Associate Director will so notify the Director. This notification will be routed through the Assistant to the Director for Administration and the General Counsel, and will include:

(1) A statement of the problem addressed by the directive and the means by which the problem was brought to the attention of OMB;

(2) The legal basis for issuance of the directive;

(3) The name of a "knowledgeable agency official," e.g., the OMB staff person responsible for handling inquiries;

(4) A statement as to whether or not a regulatory analysis will be required;

(5) A statement of the issue involved and the alternatives being explored; and

(6) A plan for public involvement and the target dates for steps in the development process. If the proposed directive affects State or local governments, the plan for public involvement must provide for consultation with those governmental units or their representatives during the early stages of drafting the directive. This consultation should be through

and in cooperation with the Intergovernmental Affairs Division.

A Regulatory Analysis must be prepared for directives having an annual effect on the economy of $50 million or more resulting in a major increase in costs or prices for individual industries, public and private institutions, levels of government or geographic regions. Such an analysis shall contain a statement of the problem, a description of the major alternative ways of dealing with the problem, and an analysis of the reasons for choosing one alternative over the others. The regulatory analysis will be published in the Federal Register at the time the draft directive is published for comment. Directives affecting State or local governments shall be accompanied by a brief description of the intergovernmental consultations conducted, the suggestions received, and the proposed response to those suggestions.

The responsible office will prepare the completed draft directive for publication in the Federal Register for a 60-day comment period. If such a period of time is too long, a brief statement will be published with the draft explaining the need for a shorter time period.

Routing of the draft for publication in the Federal Register will be through the Budget and Management Officer, General Counsel, and Assistant to the Director for Administration.

When the proposed directive is signed by the Director as a final issuance, following normal clearance procedures, it will be published in the Federal Register, with a statement, if appropriate, that any comments received on the draft and any regulatory analysis that was prepared are available for public review.

The Assistant to the Director for Administration will compile a semi-annual agenda of upcoming agency actions from this required data and will include on

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the agenda the status of actions listed on the previous agenda. Each agenda will be approved by the Director and sent to the Federal Register for publication.

b. National Archives and Records Service. A directive falling within the requirements of the National Archives and Records Service (NARS) is one that includes an interagency reporting requirement not of a budgetary, program review and coordination, or legislative clearance nature.

At the time work is initiated on such a directive the responsible program division will obtain from the Budget and Management Officer a Standard Form 360, Request for Clearance of an Interagency Reporting Requirement (see the Exhibit to Attachment B).

The Budget and Management Officer, serving as OMB's Interagency Reporting Coordinator, in conjunction with the responsible program division, will then perform the following, as required by Federal Property Management Regulation (FPMR) 101-11.11:

(1) Discuss the proposed reporting requirement with NARS. NARS will:

(a) Verify management needs;

(b) Review for duplicative reporting;

(c) Determine potential availability of information;

(d) Where applicable, recommend sampling measures; and,

(e) Assess impact of respondents.

(2) Prepare the Standard Form 360 and supporting justification, and submit to NARS.

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(3) Upon NARS' approval, promulgate the directive, ensuring that the following information is included:

(a) Purpose of requirement;

(b) Report title;

(c) Interagency Report Control Number;

(d) Report format;

(e) Preparation instructions;

(f) List of responding agencies;

(g) Frequency;

(h) Number of copies;

(i) Routing;

(j) Due date; and,

(k) Whether negative reports are required. If the report requires a form for data collection, the Interagency Report Control Number shall appear on the form, preferably in the upper-right corner.

c. Consultation with Unions. A directive requiring consultation with unions is one that proposes any substantial change in any condition of employment, including personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions (except to the extent each matter is specifically provided for by Federal statute). (There are certain management rights excluded from this provision, including the power to determine the mission, budget, organization, and number of employees of an agency.)

Whenever work is begun on a governmentwide issuance (such as a Circular, Bulletin, or Memorandum to Heads

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of Executive Departments and Establishments) that may fall under the consultation provision, the Federal Personnel Policy Division (FPPD) should be contacted for advice on the applicability of the requirement. The FPPD will handle requests from unions for consultation and will keep a current register of those unions granted such privileges. In order to avoid any delays, the FPPD should be provided copies of proposed issuances as early in the drafting process as possible. The FPPD will then make a determination regarding the need to consult with unions, help set up meetings, or directly participate in the consultation process as required.

d. Intergovernmental Consultation. All directives that may have identifiable effects (other than budgetary) on State or local governments will be coordinated with the Deputy Associate Director for Intergovernmental Affairs. This consultation should begin when a new or revised directive is being considered and continue through issuance.

e. Policies Affecting the Assistance Programs of Two or More Departments or Agencies. All directives that generally apply to the operation of Federal assistance programs on a crosscutting basis will be coordinated with the Associate Director for Management and Regulatory Policy. This coordination should begin when a new or revised directive is being considered and continue through issuance and any follow-on steps taken to guide implementation by the agencies.

f. OFPP Policy Letters and Memoranda. The following are the procedures to be followed when publishing and issuing OFPP policy letters and memoranda.

(1) Proposed policy letters shall be coordinated in draft with the General Counsel and with each OMB unit which will be affected, and also with affected agencies. Copies shall be sent to the Assistant to the Director for Administration and the Assistant Director for Management and Regulatory Policy to determine whether the

proposed policy letter falls within the requirements of Executive Order No. 12044. (See Section 510-6.a. above.)

(2) Except in emergencies and for matters which have already been through a public comment period, all proposed policy letters will be published in the Federal Register for public comment. The normal comment period shall be 60 days, but in no case less than 30 days. Such proposed policy letters shall also be sent simultaneously to all those on the current mailing list for OFPP policy letters. The Federal Register notice shall include as a minimum:

(a) The basis for the proposed policy;

(b) An analysis of the significant features of the policy;

(c) A statement of the action expected to result from implementation of the policy and an estimate of the workload on the public and the federal sector; and

(d) The anticipated effect on the procurement process.

(3) The proposed policy letter shall also be sent to the Chairman of the Senate Governmental Affairs Committee and the Chairman of the House Government Operations Committee at the same time that it is first published in the Federal Register, along with the report required by Section 8(b) of P.L. 93-400 as amended by P.L. 96-83. The OFPP Act requires such notice to Congress at least 30 days prior to the effective date of any proposed policy directive.

(4) For significant matters one or more public hearings may be scheduled, either during or after the public comment period. A 30-day notice shall normally be given for public hearings.

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(5) After review of public comments, including those presented at any public hearing, the policy letter will be rewritten and once again coordinated with OMB units, including the Office of General Counsel, and Executive agencies that will be affected. Memoranda to the Heads of Executive Departments and Establishments will be coordinated with any other OMB units which have a substantive interest.

(6) After coordination, the final policy letter shall be forwarded to the Director, through the General Counsel and the Assistant to the Director for Administration. The package going to the Director shall include:

(a) A summary of the policy letter and a signature block for the Director's concurrence;

(b) The Federal Register notice which shall include the regulatory analysis covered in 2 above;

(c) The policy letter, which shall include an effective date, a sunset date, and an indication that the Director has concurred.

(7) After concurrence by the Director, a transmittal letter to the Federal Register shall be prepared, and the policy letter shall be sent to the Budget and Management Office for processing.

(8) If the final policy letter differs significantly from the proposed policy letter which was submitted to the congressional committees (see 3 above), it shall be resubmitted to these committees at least 30 days prior to the effective date.

(9) The policy letter shall be mailed simultaneously to the Heads of Executive Departments and Establishments, to the OFPP agency contact

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points, and to any others who should receive prompt notification.

(10) If implementation is required in agency regulations, the policy letter shall be sent with a covering letter to the senior acquisition official in DOD, GSA, and NASA, directing prompt implementation in the Defense Acquisition Regulation (DAR), the Federal Procurement Regulations (FPR) and the National Aeronautics and Space Administration Procurement Regulation (NASAPR).

510-7. Content and Format of Directives. (See Exhibit 510-1 for sample format.)

a. Circulars, Bulletins, and Federal Procurement Policy letters shall contain, but not be limited to, the following sections.

(1) Purpose -- A brief statement of the reasons for or intention of the directive. Required citations should be given, but lengthy discussions of background should be avoided.

(2) Rescissions -- List previous directives, if any, rescinded by this issuance. (Note: If a Circular or Federal Procurement Policy letter is rescinded, there should always be a Transmittal Memorandum issued to that effect.)

(3) Authority -- Cite any statutory provisions or other authorities upon which the directive is based.

(4) Background -- Describe briefly the issue necessitating the issuance of the directive. Cite any statutory provisions or other authorities upon which the directive is based.

(5) Policy -- A brief statement of the general policy promulgated by the directive.

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(6) Definitions -- Succinct definitions of each key term used in the guidance document which may be uncommon or subject to varying interpretations. This section should not contain any policy guidance. Care should be taken that the definitions do not conflict with interpretations given elsewhere in the directive, for example, in attached reporting instructions. If the same terms have been defined in other directives, the same definitions should be used wherever possible.

(7) Action Requirements -- Statements of responsibilities of agency officials for carrying out the policy. Separate sections should be used for reporting requirements and for the responsibilities of specific agencies (GSA, OPM, etc.). If the requirements are lengthy and detailed, only the basic responsibilities should be listed in the body of the directive, with details appearing in an attachment. However, each guidance document, together with its attachments, should be self-contained.

(8) OMB Responsibilities -- A specific statement of the responsibilities of OMB in implementing and carrying out the policies expressed in the document.

(9) Information Contact -- The name of an OMB unit and a telephone number where further information can be obtained. The directive may state that further information may be obtained from the unit or person responsible for handling the agency's budget.

(10) Sunset Review Date -- The date by which the directive shall have a policy review. All Circulars and Federal Procurement Policy letters should include a review date no later than three years from the date of issuance. In exceptional circumstances, a longer time period may be approved by the Director. This exception should

be explained in the justification submitted in accordance with the requirements of Section 510-5. Bulletins shall have a termination date no later than one year from the date of issuance, and usually will terminate sooner. If the Bulletin requires a one-time action, the termination date may be stated "as soon as action is completed."

(11) Attachments -- If necessary, additional material, which is part of the guidance but is too detailed to include in the body of the document, may be added as an attachment. Examples are reporting forms and instructions, procedural handbooks, and lists.

b. Memoranda to Heads of Executive Departments and Establishments and Transmittal Memoranda should be brief and to the point, normally no more than one page long. Each must contain (i) the name and telephone number of the OMB unit which can provide further information (or reference to the examining unit responsible for the agency) and (ii) a termination date or the legend: "This memorandum is rescinded as soon as the prescribed action is taken." Proposed exceptions to showing a termination date or legend should be explained in the justification submitted in accordance with the requirements of Section 510-5.

510-8. Sunset Reviews

Sunset reviews shall be conducted no later than once every three years for Circulars and Federal Procurement Policy Letters. Bulletins and Memos will sunset after one year unless specific action is taken to extend them.

While there is no prescribed content or format, the sunset review should answer basic questions concerning the directive, including:

-- What is the basic objective of the directive?

-- Is the directive still needed, and if so, why?

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-- Does the directive need revision, updating, or rewriting? If so, what is the proposed schedule?

-- What results (please include measurable data) are being achieved through the directive?

-- What is the workload (include staffhour estimates) on OMB and the agencies to comply with the provisions of the directive?

-- If other levels of government are affected, are the relative federal, state and local roles appropriate?

The report should not exceed five pages in length.

510-9. Informal Guidance

On occasion OMB personnel below the Director level may need to send clarifying information to Federal agencies about the content of an existing Circular, Bulletin or other formal guidance document. Such communications may take the form of Administrative Notes, and must meet the following restrictions:

a. Administrative Notes shall be used only to clarify or explain the content of an existing formal document. They should not be used to revise, augment or change in any manner the content or intent of a formal document. Transmittal memoranda should be used to make revisions or changes.

b. Administrative Notes shall be addressed to established designated offices in the Federal agencies who have responsibility for complying with the formal guidance document or representatives of non-Federal public entities. Such offices or representatives shall be previously designated by the Agency Head. Administrative Notes shall not be addressed to agency heads.

c. Administrative Notes shall be coordinated with the heads of OMB divisions or offices having a substantive interest in the informal guidance or formal directive affected by the Administrative Note.

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In addition, the Assistant to the Director for Administration shall be notified quarterly of all informal guidance issued by each Division.

d. Administrative Notes should be brief, to the point, written in clear and concise English, and normally no longer than two pages. Include the name and telephone number of the OMB unit which can provide further information.

e. Administrative Notes terminate when the formal guidance document they clarify terminates, unless a different termination date is specified.

These requirements do not apply to communications between OMB examining units and their assigned agencies.

Approved: September 1980

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
24 August 1981

Mr. David R. Brink
President
American Bar Association
1155 East 60th Street
Chicago, Illinois 60637

Dear Mr. Brink:

Congratulations on being elected President of the American Bar Association (ABA). As promised in my telephone conversation with you on August 20th, I am forwarding for your information and action past correspondence and other information regarding the activities of the ABA's Public Contract Law Section. I hope you will take steps to correct the problem with this Section.

In recent years, the ABA has been emphasizing the work it does in serving the public. Accepting the premise that the ABA is a professional society which puts the profession's obligations to the public above the special interests of its members, I have over the past few years written several letters to your predecessors, Mr. Leonard S. Janofsky and Mr. William Reece Smith, regarding the activities of the ABA's Public Contract Law Section.

Although the Public Contract Law Section is comprised of thousands of members from all over the country, it is evident that in the area of contract disputes policy claims lawyers have dominated the Section's work and have been using their position to promote, in the name of the ABA, legislation and regulations which give them better opportunities to obtain large claims settlements for their clients. Because the subject of contract disputes procedures is arcane, it is relatively easy for them to insert subtle loopholes in the complex legislation and regulations that govern contract disputes procedures — loopholes that they can subsequently exploit to their advantage.

Enclosure (1) is the correspondence I sent to Mr. Janofsky and to Mr. Smith describing how the activities of the Public Contract Law Section members seem inconsistent with the proper role of the ABA as a professional society. The contract disputes bill they advocated in 1978 was carefully constructed to promote the special interests of claims lawyers. Rather than testifying to Congress as lobbyists for claims lawyers and their corporate clients, they were able to present their work as ABA endorsed legislation. After Congress deleted loopholes in the ABA version of the bill and added certain other safeguards in passing the 1978 Contract Disputes Act, the Public Contract Law Section has continued to lobby the Executive Branch to incorporate their original concepts and ideas into the implementing regulations.

The responses I received from Mr. Janofsky and from Mr. Smith were disappointing. Mr. Janofsky referred my letter to the Chairman of the Public Contract Law Section, Mr. O. S. Hiestand. Mr. Hiestand has been actively lobbying as an ABA spokesman in contract disputes matters, but in ways that benefit claims lawyers. Not too surprisingly, Mr. Hiestand concluded there was nothing to what I had said and that the Public Contract Law Section had acted in the public interest. Mr. Janofsky forwarded Mr. Hiestand's report to me stating: "After reviewing his report, I am convinced that the Section's activities were balanced and in the public interest."

Mr. Smith, who succeeded Mr. Janofsky, declined to investigate the Public Contract Law Section's activities stating that: "The charges ... are so sweepingly stated and so lacking in detail that inquiry would be wasteful and ineffective." Though I do not believe my previous letters were insufficient in detail for the ABA to initiate corrective action, or at least a serious inquiry, I am providing you with more information in enclosures (2) and (3). Enclosure (2) is a chronology on but one of the loopholes promoted by the Section. Enclosure (3) is a copy of the statement I gave to a joint session of the Senate Judiciary Committee and the Senate Governmental Affairs Committee highlighting problems in the ABA version of the contract disputes bill.

Mr. Smith pointed out that the Public Contract Law Section's membership includes Government lawyers, academicians, and other lawyers and that "the interest taken in given activities, and the positions taken on specific issues, vary among the total membership depending on the particular activity or issue." This statement is exactly the point I was trying to make. A few claims lawyers, who have a very high interest in legislation and regulations bearing upon the submission and processing of contract claims against the Government, have effectively been able to dominate the Section's position on such matters.

Mr. Smith further pointed out that any Section position must be presented to the Board of Governors or to the House of Delegates before being endorsed as an ABA position. He stated that the members of these groups are well informed, able lawyers who are loyal Americans. According to Mr. Smith, these groups study each item of proposed legislation and the action they take in endorsing a proposed position is deemed by them to be in the public interest. I would not expect the ABA Board of Governors or others in the review chain, however, to have the sufficient knowledge or familiarity with a narrow branch of law such as Government contract disputes to enable them to recognize the full implications of subtle wording in the proposed contract disputes legislation. Nonetheless, when the ABA endorses legislation full of self-serving loopholes, it tends to discredit itself as a patriotic and disinterested contributor to the improvement of our legal system.

I hope you will take this matter more seriously than your predecessors. Having spent most of your life practicing a different type of law in the State of Minnesota, you might be surprised at the activities of Washington claims lawyers and the harm they are doing to the reputation of the legal profession. Without question the Public Contract Law Section is generating bad publicity for the American Bar Association, and for the entire legal profession which already has a low public rating. Therefore, I urge that, as high priority during your tenure, you take steps to redirect the activities of the Public Contract Law Section to the stated purpose of the ABA – " ... to apply the knowledge and experience of the profession to the promotion of the public good."

I have found that top ABA officials tend to rely too much on the advice of ABA members and that in so doing develop "blind spots" in evaluating criticism of your profession. Therefore, I would be glad to meet with you to discuss this matter in further detail the next time you are in Washington.

In any event, I would appreciate receiving your comments on this letter and its attachments.

Sincerely,

H. G. Rickover

Enclosures
1. Correspondence between
 Messrs. Janofsky and Smith
 and me
2. Chronology of compromise of
 claims without regard to merit
3. My statement before a joint
 session of the Senate Judiciary
 and Governmental Affairs Committees

Copy to:
Attorney General of the United States
General Counsel, Department of Defense
General Counsel, Department of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command
Counsel, Naval Sea Systems Command
Deputy Commander for Contracts, Naval
 Sea Systems Command

List of correspondence between Messrs. Janofsky and Smith and me

1. My letter to Mr. Janofsky dated May 23, 1980
2. Mr. Janofsky's letter to me dated July 17, 1980
3. Mr. Janofsky's letter to me dated September 24, 1980
4. My letter to Mr. Smith dated 22 December 1980
5. Mr. Smith's letter to me dated January 28, 1981

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

May 23, 1980

Mr. Leonard S. Janofsky, President
American Bar Association
1155 East 69th Street
Chicago, Illinois 60637

Dear Mr. Janofsky:

On December 11, 1979, I wrote to you regarding the reported ex parte communication between a prominent Washington lawyer and two Supreme Court Justices. In your response dated December 21, 1979, you stated:

> "In a profession that accepts responsibility for self-discipline, there must be a high level of attention to issues of professional ethics and a vigorous program of disciplinary enforcement. I would be pleased to discuss this subject and perhaps other areas of common interest with you at our mutual convenience when I am next in Washington."

While awaiting your next visit to Washington, I thought I should bring to your attention formally another problem which I believe detracts from the reputation of your organization. The specific issue involves the conduct of the Public Contract Law Section of the ABA.

In recent years, the Public Contract Law Section of the ABA has become essentially a forum for lawyers who specialize in contract claims against the Government to pursue their own special interests, as well as those of their clients – all in the name and prestige of the ABA. For example, the Public Contract Law Section, with the sponsorship and approval of the ABA, recently promoted a contract disputes bill that would have significantly strengthened the position of contractors and their lawyers in opposing the U. S. Government in future claims litigation.

The ABA-sponsored bill contained subtle loopholes which, for the first time, would have enabled Government agencies to settle claims by "horse trading", independent of the merits of the claim and without Congressional review. When I brought this to their attention, members of Congress properly deleted these loopholes from the Contract Disputes Act.

The ABA-sponsored bill applied a double standard – which always favored contractors. For example, under the ABA bill, contractors

would have 12 months or more to appeal an agency's Board decision, but the Government would have been allowed only 120 days to appeal. Congress revised the ABA bill to apply even-handed standards.

In addition to closing major loopholes in the ABA bill, Congress – over the opposition of your Public Contract Law Section – inserted provisions requiring contractors to certify the accuracy of their claims, and established strict sanctions against those who deliberately submitted false claims.

When Congress enacted the strengthened Contract Disputes Act, the ABA's Public Contract Law Section turned its efforts toward watering down the implementing regulations. In the January 1979 issue of the Public Contract Newsletter, the Chairman of the Section stated:

> "On balance, I believe the gains achieved by this legislation outweigh what many in our Section perceive to be serious shortcomings ... Many of these shortcomings can be overcome or lessened by the implementing regulations, and in that large task our concerned committees are busily engaged."

The influence of the Public Contract Law Section was apparent in the regulations the Office of Federal Procurement Policy (OFPP) issued in April 1980 to implement the Contract Disputes Act. The OFPP regulations reflect the Public Contract Law Section's efforts to reinstate concepts Congress had rejected in the ABA-sponsored contract disputes bill and to undermine safeguards Congress had added.

In addition to their efforts to water down the implementing regulations, several prominent members of the Public Contract Law Section, two of whom testified for the contract disputes bill on behalf of the ABA, have co-authored an article in which they state:

> "Neither the Disputes Act and Acquisition Act Certificates, nor the fraudulent claims provisions of Section 5, prevent you from making imaginative or innovative claims at any time." (My underlining.)

The authors recommend specific ways for contractors to get around some of the legal safeguards of the Contract Disputes Act. For example, the authors suggest:

a. Avoiding claims certification requirements by submitting a "request for equitable adjustment" instead of a "claim."

b. Frustrating Government access to data regarding the preparation of a claim by having the data prepared by, or at the direction of, an attorney, and then claiming attorney-client privilege.

c. Labeling as "matters of judgment" those portions of a claim which are not based on fact.

The conduct of the ABA's Public Contract Law Section with respect to the Contract Disputes Act demonstrates that the ABA no longer should be considered a professional organization, but a trade association through which the members – in this case, claims lawyers – seek to further their private interests. By endorsing the Public Contract Law Section's position on the Contract Disputes Act, the ABA's House of Delegates threw the weight of the legal profession behind the claims lawyers.

I personally doubt that if all of the ABA's membership understood what this small self-interested group is advocating, they would be in favor. Nor do I believe they would favor lending their names to causes promoted by small groups of lawyers who seek to "use" the ABA for their own selfish, anti-Government purposes. I have too high an opinion of the majority of your members to conceive otherwise. Regardless of whether or not the ABA Delegates understood what they were endorsing in the case of the Contract Disputes Act, the situation does not speak well for the ABA nor enhance its image as a professional society.

If the ABA wishes to improve the present poor public attitudes toward the legal profession, it should ensure that the various ABA segments, such as the Public Contract Law Section, refrain from using the ABA as a forum to promote their business interests. Specifically, the ABA should not be used to sponsor legislation aimed at enhancing the position of a small number of its members and their clients in litigation to the detriment of the Government. Nor should these special interests be permitted to use the ABA to promote legal theories or regulations which circumvent the obvious intent of the law. The ABA should instead direct its efforts to the very real problems that threaten to undermine our system of justice, e.g., the proliferation of frivolous lawsuits; abuses of Freedom of Information Act requests and discovery procedures; false claims and other forms of legal harrassment; excessive billings by attorneys; widespread lack of enforcement of the ABA's Code of Professional Conduct.

I would appreciate your looking into this matter and informing me whether you and your compatriots at the head of the ABA endorse the conduct of your Public Contract Law Section and its members with respect to the Contract Disputes Act. I would also like to know what action, if any, the ABA intends to take to remedy the situation. I would appreciate your reply to the issues raised in this letter at your early convenience.

Sincerely,

H. G. Rickover

Copy to:
Attorney General of the United States
General Counsel, Department of Defense
General Counsel, Department of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
LEONARD S. JANOFSKY
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE: 312/947-4042

July 17, 1980

Admiral H. G. Rickover
Department of the Navy
Naval Sea Systems Command
Washington, D.C. 20362

Dear Admiral Rickover:

This will acknowledge your latest letter, dated May 23, in which you criticize the Association's Public Contract Law Section. I apologize for not responding sooner, but I wanted to be certain that I had collected all the relevant information on this matter before I responded.

I reject your allegation that the Section is "essentially a forum for lawyers who specialize in contract claims against the Government to pursue their own special interests, as well as those of their clients . . ." The Section's membership includes lawyers in the general practice of law, lawyers who represent government contractors, lawyers who work for government agencies, and academicians. The Section has government attorneys on its policy-setting Council and on its committees. Like all ABA sections and committees, the Public Contract Law Section is required to appoint committee members representing all differing points of view.

During the past year the Chairman of the Section, Theodore M. Kostos, has made several appeals to the general counsels of the major federal procurement agencies urging them to encourage their attorneys to join the Section and play an active role in its deliberations. We would, of course, welcome your assistance in encouraging more government attorneys to become active in the Section.

As for your comments about the substantive deliberations on the Contract Disputes Act of 1978, I have asked the Chairman-Elect of the Section, O. S. Hiestand, for a full

report on the Section's activities on this legislation. After reviewing his report, I am convinced that the Section's activities were balanced and in the public interest. A copy of his report is attached.

Section members were advocates for the positions they thought were correct — just as you were — but I am convinced that their work on this legislation was appropriate and helpful to the Congress. To my knowledge, no one on Capitol Hill has expressed the opinion that the Section's activities on the Contract Disputes Act were either unethical or improper.

In the closing paragraphs of your letter you suggested that the ABA should be involved in several "very real problems that threaten to undermine our system of justice." I couldn't agree with you more. In fact, the ABA is already deeply involved in most of those issues.

I appreciate your interest in the activities of the Association, but I believe that your most recent criticism of the Public Contract Law Section was unjustified.

Cordially,

Leonard S. Janofsky

Leonard S. Janofsky

LSJ:dl
Attachment
7195C

b. S. Hiestand
July 9, 1980

Comments on Rickover Letter to Janofsky

Admiral Rickover's assertions are not new. He has consistently characterized the Public Contract Law Section as a group of Government contract claims lawyers, whenever the Section or its members oppose a position that he endorses.

The Contract Disputes Act of 1978 was the product of the recommendations of the Commission on Government Procurement in 1972. During the intervening years some nine bills were introduced in Congress, and extensive hearings, study, and redrafting occurred. The Public Contract Law Section appointed a special committee to analyze the Procurement Commission recommendations and subsequently drafted a version of a Disputes Act that incorporated most of the Commission's recommendations. Some of the issues raised resulted in extensive debate and disagreements within the Council. At least one issue was subject to a mail ballot by the entire membership of the Section.

The Section's proposed legislation was submitted to the ABA House of Delegates in 1976 with a resolution encouraging Congress to adopt legislation consistent with the principles in the "ABA bill." The resolution was approved and the draft bill transmitted to the appropriate Congressional committees in 1976. Many of the features of the ABA bill were incorporated in the bills subsequently introduced in the House and Senate. In 1977 and 1978 the House and Senate committees held hearings at which representatives of the Section testified on behalf of ABA.

Contrary to Admiral Rickover's assertion, the Public Contract Law Section membership includes a broad cross-section of Government, industry, and private attorneys. It has always been the policy of the Section to include Government attorneys on the Council, and to have committees that include Government and contractor attorneys to the extent possible. The special committee that drafted the so-called "ABA bill" included a Department of Justice attorney. The then General Counsel of GAO was a member of the Council when it approved the draft bill submitted to the ABA House of Delegates.

Admiral Rickover characterizes the ABA bill as having "subtle loopholes" which he persuaded Congress to eliminate. As an example he cites a double standard that permitted contractors 12 months to appeal an adverse BCA decision, while allowing the Government only 90 days. The ABA bill did not provide for Government appeals and, consequently, did not contain a double standard.

The right of Government appeal was included in the bill (S. 3178) introduced by Senator Chiles on June 8, 1978. Although the ABA witnesses testified that ABA did not favor granting such a right, it supported the language with respect to Government appeal.

The Admiral also asserts that the ABA bill would have permitted, for the first time, "horse trading" on claims without regard to their merit. The language incorporated in the ABA bill as well as S. 3178 expressly authorizing compromises and settlement of claims, was based on the 1972 recommendations of the Procurement Commission.

Admiral Rickover, acting on his own behalf and not DOD, offered nine specific additions to S. 3178 when he testified before the Senate Committees. The Justice Department, which was requested to comment on his proposed additions, gave a qualified endorsement of the Admiral's certification proposal but stated it did not see a need for the other additions. As reported out by the Committees, S. 3178 did not include a certification requirement, but did include a new civil penalty for misrepresentation of fact or fraud in connection with a claim.

S. 3178 was subsequently amended on the floor to add a certification requirement for claims in excess of $50,000.

Since the certification provision was added after the conclusion of hearings, no testimony was offered on behalf of ABA. However, Section representatives discussed both the certification and civil penalty provisions at length with the staffs of the House and Senate committees. Since the certification requirements were believed to be unnecessary and detrimental to the procurement process, were not contained in the Procurement Commission recommendations, and were not in the draft bill approved by the House of Delegates, the Section representatives opposed their inclusion in the Act.

Neither the certification nor the civil penalty provisions were considered necessary by the bill's sponsor (Senator Chiles), but were accepted by him in order to move the bill in the Senate. The House passed bill (which most closely resembled the "ABA bill") did not include either provision. When the Senate passed version was referred to the House, the House sponsors were opposed to accepting those provisions (among others). They did so at the request of individual members of the Public Contract Law Section, in order to assure enactment of the other reforms contained in the bill.

Apart from the questionable need for the certification and new civil penalty provisions, the method by which they were added, the imprecise wording, and the sparse legislative history resulted in considerable uncertainty as to their meaning and

impact. These were two of the provisions in the Act Tim Coburn referred to in the January 1979 Newsletter when he stated there were shortcomings in the Act which could be overcome by implementing regulations.

Admiral Rickover asserts that the Section caused the Office of Federal Procurement Policy (OFPP) to issue regulations implementing the Act that reinstate concepts Congress rejected and that undermine safeguards the Congress added. The OFPP regulations went through several iterations. They were the subject of extensive study by a Section committee, and were debated by the Council in open meetings. The positions of the Council on various aspects of the draft regulations were communicated to OFPP by others. Three of the Council members were Government attorneys and two were also members of the DOD BCA. The final regulations were concurred in by the DOD before being issued by OFPP.

Admiral Rickover's letter is critical of an article written by certain members of the Section. The article referred to is a briefing paper published by Federal Publications, Inc., and was authored by four partners of a prominent law firm. All have extensive backgrounds in Federal contracts. Although the Admiral makes a point that two of the authors testified on behalf of ABA, he does not mention that one of the partners testifed on behalf of the District of Columbia Bar Association, and against some of the Act's provisions endorsed by ABA.

While the Section was significantly involved in the development of the Contract Disputes Act, and the OFPP implementing regulations, there are no indications that representatives of ABA acted improperly or served self-interests under the guise of ABA. Efforts to reform the remedies system for Federal contracts has been a priority item of the Section for many years. The Procurement Commission study of the remedies system clearly substantiated the need for reform. The subsequent effort and talent devoted to this effort by members of the Public Contract Law Section have been in the best tradition of public service by members of the legal profession.

AMERICAN BAR ASSOCIATION

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September 24, 1980

Vice Admiral H. G. Rickover
Naval Sea Systems Command
Department of the Navy
Washington, D.C. 20362

Dear Admiral Rickover:

In view of our exchange of correspondence during my term as president of the American Bar Association, I thought you might be interested in the remarks of Karen Hastie Williams, Administrator of the Office of Federal Procurement Policy, delivered to the ABA Section of Public Contract Law at the recent Annual Meeting in Hawaii.

Although I am enclosing the entire text, I am not suggesting you read all of her remarks. I would appreciate it, however, if you would please note her comments on pages 2-3 where she says:

> ". . . I want to take time and specifically recognize [the Office of Federal Procurement Policy's] special indebtedness to the members of the Public Contract Law Section [of the American Bar Association]. At last count OFPP had issued over 1,600 pages of material pertaining to our proposed Federal Acquisition Regulation (FAR). The Public Contract Law Section has painstakingly reviewed each page of this material and has offered some very insightful and cogent comments for our consideration.
>
> "The review of the FAR materials has not been an easy task. The material is extensive and complex, and the fact that we have been able to rely on the Public Contract Law Section for constructive, thoughtful review of our work is truly appreciated. Your efforts merit much recognition. . . ."

I am sure you will be pleased to know that a leading government official in respect of federal procurement policy is of the opinion that the American Bar Association, through its Public Contract Law Section, has taken a constructive attitude with respect to the important problems which exist regarding federal procurement.

With all good wishes.

Cordially,

Leonard S. Janofsky

LSJ/rle

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

LUNCHEON ADDRESS OF KAREN HASTIE WILLIAMS
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
TO THE
PUBLIC CONTRACT LAW SECTION, AMERICAN BAR ASSOCIATION
ANNUAL MEETING
HONOLULU, HAWAII

AUGUST 4, 1980

LADIES AND GENTLEMEN, I AM PLEASED TO BE HERE TO PARTICIPATE IN YOUR 1980 ANNUAL MEETING.

I ADDRESS YOU, TODAY, IN TWO CAPACITIES. FIRST, AS ADMINISTRATOR FOR THE OFFICE OF FEDERAL PROCUREMENT POLICY (OFPP) AND SECOND AS A LAWYER AND FELLOW MEMBER OF THE ABA. I'M EQUALLY PROUD OF BOTH TITLES.

MY EXPERIENCE AND EDUCATION AS A LAWYER HAVE BEEN INVALUABLE SINCE MY APPOINTMENT AS ADMINISTRATOR LAST MARCH. SIMILARLY, DURING MY TENURE AS ADMINISTRATOR, I HAVE HAD THE OPPORTUNITY TO EXPERIENCE THE REWARDS (AND IN SOME CASES THE FRUSTRATIONS) OF BEING RESPONSIBLE FOR A HIGHLY COMPLEX $100 BILLION PER YEAR PROGRAM THAT IS SOMETIMES CONTROLLED BY

AMBIGUOUS AND OFTEN CONFLICTING STATUTES. ACCORDINGLY, I HAVE FOUND THE TWO ROLES (ADMINISTRATOR AND LAWYER) NOT ONLY COMPATIBLE BUT COMPLIMENTARY.

IN MY REMARKS THIS AFTERNOON I WANT TO REVIEW WITH YOU THE CURRENT ROLE OF THE OFFICE OF FEDERAL PROCUREMENT POLICY AND DISCUSS SEVERAL OF THE MAJOR MANAGEMENT AND LEGAL ISSUES THAT ARE INTERTWINED IN CURRENT OFPP EFFORTS.

BEFORE PROCEEDING WITH THAT DISCUSSION, HOWEVER, I WANT TO TAKE TIME AND SPECIFICALLY RECOGNIZE OFPP'S SPECIAL INDEBTEDNESS TO THE MEMBERS OF THE PUBLIC CONTRACT LAW SECTION. AT LAST COUNT OFPP HAD ISSUED OVER 1,600 PAGES OF MATERIAL PERTAINING TO OUR PROPOSED FEDERAL ACQUISITION REGULATION (FAR). THE PUBLIC CONTRACT LAW SECTION HAS PAINSTAKINGLY REVIEWED EACH PAGE OF THIS MATERIAL AND HAS OFFERED SOME VERY INSIGHTFUL AND COGENT COMMENTS FOR OUR CONSIDERATION.

THE REVIEW OF THE FAR MATERIALS HAS NOT BEEN AN EASY TASK. THE MATERIAL IS EXTENSIVE AND COMPLEX, AND THE FACT THAT WE HAVE BEEN ABLE TO RELY ON THE PUBLIC CONTRACT LAW SECTION FOR CONSTRUCTIVE, THOUGHTFUL REVIEW OF OUR WORK IS TRULY APPRECIATED. YOUR EFFORTS MERIT MUCH RECOGNITION, AND I WANT TO EXPRESS MY PERSONAL THANKS TO TED KOSTOS, BOB WALLICK AND, OF COURSE, SPARKS HIESTAND -- YOUR PRESIDENT-ELECT -- FOR THEIR SUPPORT AND HELP NOT JUST WITH THE FAR BUT FOR THEIR OVERALL EFFORTS TO ASSIST OFPP. WE HAVE NOT ALWAYS COME OUT ON THE SAME SIDE OF EVERY ISSUE, BUT THE DIALOGUE WE HAVE ESTABLISHED IS IMPORTANT. WE REALIZE THE BENEFITS OF KEEPING OUR MINDS AND LINES OF COMMUNICATION OPEN.

WITH THE HELP OF THE PUBLIC CONTRACT LAW SECTION AS WELL AS THE ASSISTANCE WE HAVE RECEIVED FROM MANY OTHER ORGANIZATIONS AND INDVIDUALS, OFPP HAS BEEN ABLE TO ACHIEVE A SUBSTANTIAL LITANY OF SUCCESSES OVER THE LAST SIX YEARS. THOSE

ACCOMPLISHMENTS, AND THERE HAVE BEEN MANY, REPRESENT THE GOOD NEWS SIDE OF OFPP. A BAD NEWS SIDE, HOWEVER, DOES EXIST. THIS IS EXEMPLIFIED BY THE FACT THAT GOVERNMENT PROCUREMENT IS STILL BESET WITH THE SAME HOST OF PROBLEMS THAT EXISTED IN 1974 WHEN CONGRESS CREATED OFPP. SPECIFICALLY:

- WE HAVE PROLIFERATION AND FRAGMENTATION OF FUNCTIONS, POLICIES, PROCEDURES, FORMS AND REGULATIONS. THERE JUST ISN'T ENOUGH UNIFORMITY OR DISCIPLINE IN PROCUREMENT. WHEN DEALING WITH DIFFERENT AGENCIES, YOU SOMETIMES THINK YOU ARE DEALING WITH DIFFERENT GOVERNMENTS.

- THERE IS STATUTORY FRAGMENTATION. PRESENTLY, THERE ARE OVER 4,000 SEPARATE PROVISIONS OF LAW GOVERNING PROCUREMENT.

- THERE ARE REGULATORY BURDENS -- SOME SELF-INFLICTED, OTHERS OUTWARDLY IMPOSED. BUT WHATEVER THE SOURCE THE FIVE FOOT SHELF OF REGULATIONS THAT MANY GOVERNMENT BUYERS MUST COPE WITH ACTUALLY EXISTS. IT IS NOT JUST AN EXPRESSION.

- THE TWO BASIC STATUTES GOVERNING PROCUREMENT -- THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949 AND THE ARMED SERVICES PROCUREMENT ACT OF 1947 -- ARE OVER 30 YEARS OLD.

- O WE HAVE SOME 40,000 MILITARY SPECIFICATIONS AND STANDARDS AND 6,000 FEDERAL SPECIFICATIONS AND STANDARDS. IN MANY CASES, IF COMMERCIAL PRODUCTS DON'T MATCH-UP WITH THE SPECS, THE ATTITUDE IS CHANGE THE PRODUCT, DON'T ASK THE GOVERNMENT TO CHANGE THE SPECIFICATION.

- O THE TRAINING AND COMPETENCE OF PROCUREMENT PERSONNEL IS INADEQUATE. THERE AREN'T ANY STANDARD CRITERIA FOR QUALIFYING OR EVALUATING PROCUREMENT PERSONNEL -- INCLUDING CONTRACTING OFFICERS.

- O LAST, BUT CERTAINLY NOT LEAST, WE HAVE COMPETING AND, IN SOME INSTANCES, CONFLICTING OBJECTIVES. THE SOCIAL AND POLITICAL OBJECTIVES OF THE SOCIO-ECONOMIC PROGRAMS HAVE NEVER BEEN TRULY ACCEPTED OR RECONCILED WITH TRADITIONAL PROCUREMENT THINKING.

IN REAUTHORIZING OFPP LAST YEAR, CONGRESS TOOK A BROAD LOOK AT THE VARIOUS PROBLEMS THAT PLAGUE THE PROCUREMENT PROCESS. CONGRESS RECOGNIZED MANY OF THE PROBLEMS HAVE BECOME INHERENT DURING THE DEVELOPMENT OF THE SYSTEM OVER THE LAST GENERATION. IT RECOGNIZED THAT SWEEPING CHANGES ARE NEEDED AND A PHRASE - THE UNIFORM PROCUREMENT SYSTEM - WAS

COINED. ALL OF US IN THE PROCUREMENT COMMUNITY HAVE BECOME INCREASINGLY FAMILIAR WITH THAT PHRASE DURING THE PAST FEW MONTHS. THE REQUIREMENT FOR DEVELOPING A UPS TO CORRECT THE DEFICIENCIES OF THE PRESENT SYSTEM IS STATUTORILY ASSIGNED TO OFPP. THE DEVELOPMENT OF THE SYSTEM IS CURRENTLY OUR NUMBER ONE PRIORITY, AND I WOULD LIKE TO BRIEFLY GIVE YOU AN OVERVIEW OF THE UPS CONCEPT AND OF OUR PLAN AND SCHEDULE FOR COMPLETING ITS DEVELOPMENT.

UNIFORM PROCUREMENT SYSTEM

IN REQUIRING THE UPS, OUR NEW LAW (P.L. 96-83) PROVIDES A TWO PHASE PLAN. PHASE I TERMINATES THIS OCTOBER; PHASE II IS TO BE COMPLETED BY OCTOBER 1981.

PHASE I IS NOW WELL UNDERWAY. IT INCLUDES A FULL DESCRIPTION OF THE PROPOSED SYSTEM, IT'S PROJECTED COSTS AND

BENEFITS, AND SHORT AND LONG-TERM PLANS FOR IMPLEMENTATION. I EXPECT THE PHASE I PROPOSAL TO BE SUBJECTED TO EXTENSIVE CONGRESSIONAL REVIEW WHICH, ALONG WITH THE PROPOSAL ITSELF, WILL SERVE AS A FOUNDATION FOR OUR SUBSEQUENT EFFORTS IN PHASE II.

FOR PHASE II, THE CONGRESS HAS REQUIRED THAT WE DEVELOP AND PROPOSE A CENTRAL MANAGEMENT SYSTEM TO DIRECT AND OVERSEE THE OPERATION OF THE UPS. ALSO REQUIRED, IF NECESSARY, ARE LEGISLATIVE CHANGES INCLUDING A PROPOSAL FOR A CONSOLIDATED PROCUREMENT STATUTE. THUS, WE HAVE AN OPPORTUNITY TO SORT OUT SOME OF THOSE 4,000 SEPARATE PROVISIONS OF LAW.

AS IT NOW STANDS, THE STRUCTURE OF THE UPS CONSISTS OF FIVE ELEMENTS:

1. UNIFORM PROCUREMENT LEGISLATION. TO THE EXTENT FEASIBLE, WE WILL RECOMMEND ONE BASIC STATUTE FOR PROCUREMENT.

2. UNIFORM PROCUREMENT REGULATIONS. THE FEDERAL ACQUISITION REGULATION (FAR), WHICH WE PLAN TO IMPLEMENT IN MID-1981, WILL REPLACE THE FEDERAL PROCUREMENT REGULATIONS, MOST OF THE DEFENSE ACQUISITION REGULATION, AND THE PROCUREMENT REGULATIONS USED BY MOST OTHER INDIVIDUAL AGENCIES. IN ADDITION, WE EXPECT TO RECOMMEND ADOPTION OF A UNIFORM FEDERAL PROPERTY MANAGEMENT REGULATION.

3. A UNIFORM MANAGEMENT SYSTEM. THIS SYSTEM WILL ADDRESS SUCH ASPECTS OF PROCUREMENT MANAGEMENT AS THE ORGANIZATIONAL PLACEMENT OF THE PROCUREMENT FUNCTION WITHIN AN AGENCY; THE UTILIZATION OF GOVERNMENT-WIDE CONTRACT ADMINISTRATION AND AUDIT GROUPS; THE ELIMINATION OF DUPLICATION AND OVERLAP THROUGH, WITHIN, AND AMONG PROCUREMENT OFFICES, AND FURTHERANCE OF THE "ONE ITEM -- ONE MANAGER" CONCEPT ON A GOVERNMENT-WIDE BASIS.

4. THE FEDERAL PROCUREMENT DATA SYSTEM. IF YOU ARE GOING TO MANAGE, YOU NEED DATA. WE HAVE THE BASIC CONTRACT DATA SYSTEM IN PLACE AND YOU CAN NOW GET CONTRACT DATA FOR FY 1979. THE DATA CAN BE SORTED IN A VARIETY OF WAYS, E.G., PRODUCT, FIRM, AGENCY, CITY, COUNTY, CONGRESSIONAL DISTRICT, ETC. WE NOW KNOW WHO IS BUYING WHAT, FROM WHOM, AND IN WHAT QUANTITIES.

5. UNIFORM PROCUREMENT PERSONNEL SYSTEM. THIS SYSTEM WILL ESTABLISH STANDARDIZED RECRUITMENT, TRAINING AND CAREER DEVELOPMENT PROGRAMS TO ENSURE THE BUILDING AND MAINTENANCE OF A QUALIFIED PROCUREMENT WORKFORCE IN ALL AGENCIES.

THREE INTERAGENCY TASK GROUPS WERE ASSEMBLED IN MAY TO REVIEW THE ENTIRE PROCUREMENT PROCESS IN THE CONTEXT OF THE ABOVE STRUCTURE. EACH GROUP LOOKED AT THE PROCESS FROM ONE OF THREE PERSPECTIVES: ACQUISITON, SUPPLY, OR PROCUREMENTS UNDER FEDERALLY-ASSISTED PROGRAMS.

REPORTS FROM THE THREE TASK GROUPS WERE RECEIVED TWO WEEKS AGO AND ARE NOW BEING REVIEWED BY AN INTERAGENCY COORDINATING COMMITTEE. THE COMMITTEE'S JOB IS TO TAKE THE REPORTS AND MELD THEM INTO A SINGLE INTEGRATED UPS PROPOSAL. A NOTICE WAS PUBLISHED IN THE FEDERAL REGISTER LAST WEEK SOLICITING VIEWS ON THE REPORTS AND ADVISING THAT WE PLAN TO HOLD PUBLIC HEARINGS ON THE PROPOSAL. THESE HEARINGS WILL BE HELD DURING LATE AUGUST AND EARLY SEPTEMBER IN BOSTON, DETROIT, HOUSTON, LOS ANGELES AND WASHINGTON, D.C. (THE DATES AND PLACES OF THE HEARINGS ARE LISTED IN ATTACHMENT 1.)

YOU MAY BE AWARE WE HELD AN EARLIER PUBLIC HEARING ON THE UPS IN MAY AT WHICH THE PUBLIC CONTRACT LAW SECTION WAS WELL-REPRESENTED BY BOB WALLICK. THE PURPOSE OF THAT HEARING WAS TO DISCUSS THE CONCEPT AND GET THE BENEFIT OF A WIDE RANGE

OF VIEWS BEFORE WE MOVED INTO THE DRAFTING STAGE. FRANKLY, I WAS DISAPPOINTED IN THE PUBLIC'S RESPONSE, ESPECIALLY INDUSTRY. WE RECEIVED COMMENTS FROM LESS THAN 40 INDIVIDUALS AND ORGANIZATIONS. THESE COMMENTS DID, HOWEVER, REPRESENT A WIDE VARIETY OF INTERESTS, AND I HOPE WE CAN BUILD ON THEM. IN VIEW OF THE AVAILABILITY OF SPECIFIC RECOMMENDATIONS ON WHICH TO COMMENT, THE UPCOMING HEARINGS SHOULD BE MORE PRODUCTIVE. I URGE YOU AS AN ORGANIZATION TO PARTICIPATE AND TO ENCOURAGE THE PARTICIPATION OF ANY OF YOUR INTERESTED CLIENTS.

UPON COMPLETION OF THE SCHEDULED HEARINGS, OUR PLAN IS TO MODIFY AND REWRITE THE CONSOLIDATED PROPOSAL. YOU MAY BE ASSURED ALL VIEWS RECEIVED DURING THE PUBLIC COMMENT PERIOD WILL BE CAREFULLY CONSIDERED PRIOR TO ISSUANCE OF OUR FINAL PROPOSAL.

BECAUSE OF THE MAGNITUDE OF THE UPS PROJECT, I HAVE PROVIDED ONLY AN OUTLINE THIS AFTERNOON. I'M CONVINCED,

92-783 O - 82 - 13

HOWEVER, OUR CHANCE FOR SUCCESS IN THIS ENDEAVOR CAN BE SIGNIFICANTLY ENHANCED BY YOUR INPUT. UNLESS THE UPS REFLECTS THE CONCERNS OF THE PEOPLE AND INSTITUTIONS WHO MUST RELY ON IT ON A DAILY BASIS, IT WILL HAVE BEEN AN EMPTY, COSTLY EXERCISE. I WANT TO ASSURE YOU THAT WILL NOT BE THE CASE AND AGAIN I URGE YOUR ACTIVE INVOLVEMENT.

LEGAL ISSUES

CONSIDERING THE MYRIAD OF LEGAL ISSUES WE FACE IN DEVELOPING THE UPS AND IN CONDUCTING OUR DAY-TO-DAY EFFORTS, I WANT TO HIGHLIGHT THREE SPECIFIC TOPICS THIS AFTERNOON -- (1) CONTRACT DISPUTES; (2) BID PROTESTS; AND (3) DEBARMENT AND SUSPENSION. THE TOPICS WILL GIVE YOU AN INDICATION OF THE TYPES AND COMPLEXITY OF THE PROBLEMS FACED BY THE OFPP STAFF AND OUR UPS DRAFTING TASK GROUPS. THESE ARE NOT NEW ISSUES. OUR

OPPORTUNITY, HOWEVER, IS UNIQUE UNDER THE UPS FOR IMPROVING THEIR LEGAL ENVIRONMENT.

CONTRACT DISPUTES

IN A PROCUREMENT SYSTEM AS VAST AND DIVERSE AS THE GOVERNMENT'S IT IS INEVITABLE THAT DISPUTES WILL ARISE. GENERALLY, DISPUTES SURFACE IN THE FORM OF CLAIMS WHICH ARE PRESENTED TO THE CONTRACTING OFFICER. AS YOU KNOW THE CURRENT DISPUTE RESOLUTION PROCESS IS GOVERNED BY THE CONTRACT DISPUTES ACT OF 1978, P.L. 95-563.

THE CONTRACT DISPUTES ACT GIVES THE CONTRACTING OFFICER WIDE DISCRETION IN RESOLVING OR SETTLING CLAIMS. WHEN SETTLEMENT OR OTHER RESOLUTION OF A CLAIM OR DISPUTE IS NOT POSSIBLE AT THE CONTRACTING OFFICER LEVEL, THE STATUTE REQUIRES THE ISSUANCE OF A WRITTEN DECISION STATING THE REASONS FOR DENYING THE CLAIM. UPON RECEIPT OF THE CONTRACTING

OFFICER'S DECISION, THE CONTRACTOR HAS THREE CHOICES. THE DECISION CAN BE ACCEPTED. THE CONTRACTOR CAN APPEAL THE DECISION TO AN AGENCY BOARD OF CONTRACT APPEALS WITHIN 90 DAYS, OR THE CONTRACTOR CAN APPEAL THE DECISION TO THE COURT OF CLAIMS WITHIN ONE YEAR.

ALTHOUGH IT MAY BE TOO EARLY TO PASS JUDGMENT ON THE NEW DISPUTE PROCESS (THE ACT HAVING BEEN IN EFFECT FOR SLIGHTLY OVER A YEAR), I WOULD LIKE TO MAKE A FEW GENERAL OBSERVATIONS ON SOME APPARENT ADVANTAGES AND DISADVANTAGES OF THE SYSTEM.

ON THE POSITIVE SIDE IS THE FACT THAT RELATIVELY FEW APPEALS HAVE BEEN TAKEN TO THE COURT OF CLAIMS FROM EITHER CONTRACTING OFFICER DECISIONS OR DECISIONS OF BCA'S. BECAUSE NO GREAT RUSH HAS DEVELOPED BY CONTRACTORS TO GO DIRECTLY TO THE COURT OF CLAIMS, IT MAY BE ASSUMED CONTRACTORS ARE GENERALLY SATISFIED WITH THE BCA'S AS FORUMS FOR RESOLVING DISPUTES. ONLY

ONE APPEAL HAS BEEN TAKEN TO THE COURT OF CLAIMS BY THE GOVERNMENT FROM A BOARD DECISION. THIS IMPLIES GENERAL ACCEPTANCE BY THE AGENCIES AND THE ATTORNEY GENERAL OF THE PERFORMANCE OF THE BOARDS.

IN CONSIDERING THE DISADVANTAGES OF THE PRESENT SYSTEM, IT HAS BEEN NOTED THAT A UNIFORM PROCUREMENT SYSTEM OPERATING WITH UNIFORM CONTRACT CLAUSES SHOULD HAVE UNIFORM INTEPRETATION. ONE OF OUR UPS TASK GROUPS HAS RECOMMENDED THAT IN LIEU OF AGENCY BOARDS OF CONTRACT APPEALS THE GOVERNMENT SHOULD CONSIDER ESTABLISHING ONE CENTRAL BOARD. THE ESTABLISHMENT OF ONE BOARD WOULD, IN THE TASK GROUP'S VIEW, ELIMINATE THE PROBLEMS OF UNEVEN EXPERIENCE IN BOARD MEMBERS; WOULD PROVIDE UNIFORMITY IN INTERPRETATION, AND WOULD PROVIDE CONTRACTORS WITH UNIFORM RULES OF PROCEDURE.

A FURTHER BENEFIT WOULD BE TO DIMINISH THE PERCEPTION NOW HELD BY SOME CONTRACTORS THAT AGENCY BOARDS ARE NOT INDEPENDENT DECISION MAKERS. FINALLY, ANOTHER NOTED BENEFIT IS THAT A SINGLE BOARD INDEPENDENT OF THE AGENCIES, AND WITH ALL OF THE REMEDIES AVAILABLE TO IT AS ARE AVAILABLE IN THE COURT OF CLAIMS, SHOULD ELIMINATE THE NEED FOR THAT COURT TO MAINTAIN CONCURRENT JURISDICTION IN CONTRACT CASES.

WHILE THE PRESENT BCA SET-UP APPEARS TO WORK, WE DO HAVE SOME CONCERN REGARDING THE DISPARITY IN THE SIZE AND CASE LOADS OF THE VARIOUS BOARDS. THIS DISPARITY CONTRIBUTES TO DIFFERENCES IN EXPERIENCE OF BOARD MEMBERS AND SOMETIMES RESULTS IN UNEVEN LITIGATION BEFORE THE BOARDS. THE VARIOUS BOARDS CAN AND DO INTERPRET CONTRACT CLAUSES DIFFERENTLY LEADING TO THE ANOMALOUS RESULT THAT LITIGATION INVOLVING IDENTICAL ISSUES WITH DIFFERENT AGENCIES MAY HAVE DIFFERENT RESULTS.

CURRENTLY, THE CONTRACT DISPUTES ACT INVESTS OUR OFFICE WITH THE AUTHORITY AND RESPONSIBILITY FOR: (1) ADVISING AGENCY HEADS CONCERNING THE ESTABLISHMENT OF BOARDS OF CONTRACT APPEALS; AND (2) ALLOCATING AMONG THE AGENCY BOARDS THE SEVENTY SENIOR EXECUTIVE SERVICE POSITIONS AUTHORIZED BY THE ACT. THE INITIAL POSITION ALLOCATIONS PURSUANT TO THE ACT WERE MADE IN JUNE 1979. THE OFPP STAFF AND THE CHAIRMEN OF THE SEVERAL BOARDS ARE CURRENTLY WORKING TO DEVELOP IMPROVED WORKLOAD MEASUREMENT CRITERIA FROM WHICH FUTURE POSITION ALLOCATIONS WILL BE MADE. IN ADDITION, THE DEBATE ON THE RESPECTIVE ADVANTAGES AND DISADVANTAGES ASSOCIATED WITH CONSOLIDATING THE BOARDS WILL CONTINUE DURING OUR UPS DELIBERATIONS, AND YOUR VIEWS ARE SOLICITED.

BID PROTESTS

BID PROTESTS REPRESENT ANOTHER AREA WHERE WE NOW HAVE A UNIQUE OPPORTUNITY FOR LEGAL INNOVATION. ALTHOUGH THE GOVERNMENT ENTERS INTO HUNDREDS OF THOUSANDS OF PROCUREMENT ACTIONS EACH YEAR, FORMAL PROTESTS OF THESE ACTIONS ARE RELATIVELY SMALL IN NUMBER BUT THE NUMBER IS GROWING. PROVIDING A PROCEDURE FOR DEALING WITH THESE PROTESTS IS AN IMPORTANT PART OF ANY PROCUREMENT SYSTEM.

CURRENTLY, DISAPPOINTED BIDDERS HAVE THREE AVENUES TO ASSERT THEIR COMPLAINTS. THEY CAN PROTEST TO THE AGENCY DIRECTLY IN ACCORDANCE WITH ITS PROCEDURES. THEY CAN PROTEST TO THE GENERAL ACCOUNTING OFFICE IN ACCORDANCE WITH ITS PROCEDURES; OR, THEY CAN FILE AN ACTION IN FEDERAL COURT. THE PROTESTORS ARE PRIMARILY INTERESTED IN STOPPING AN AWARD, IN OVERTURNING AN AWARD, OR IN HAVING PERFORMANCE OF AN

AWARDED CONTRACT SUSPENDED PENDING A REVIEW OF THE AWARD PROCEDURES.

IN STUDYING THE BID PROTEST PROCEDURE THE UPS TASK GROUP CONCLUDED THAT THERE ARE TOO MANY AGENCIES INVOLVED IN DECIDING BID PROTESTS. FURTHER, THEY FOUND DIFFERING PROCEDURES AND, DEPENDING ON THE FORUM CHOSEN, THAT DECISIONS WERE OFTEN UNPUBLISHED THEREBY PROVIDING NO GUIDANCE FOR FUTURE PROCUREMENTS. TO ALLEVIATE THESE PROBLEMS THE TASK GROUP HAS RECOMMENDED A SINGLE FORUM FOR REVIEW OF BID PROTESTS. THE PROPOSED FORUM IS TO HAVE SUFFICIENT AUTHORITY TO PREVENT AWARDS OR TO SUSPEND PERFORMANCE OF CONTRACTS, IF NECESSARY, PENDING A DECISION ON THE MERITS. THIS FORUM WOULD BE IN THE EXECUTIVE BRANCH AND IT WOULD BE REQUIRED TO PUBLISH ITS DECISIONS. IN ADDITION, THE TASK GROUP RECOMMENDED THAT A SINGLE SET OF RULES OF PROCEDURE BE PUBLISHED AND PUBLICIZED SO

THAT CONTRACTORS ARE AWARE OF THEM AND CAN HAVE ACCESS TO THEM.

IN COMPARISON TO THE UPS TASK GROUPS' RECOMMENDATIONS, THE COMMISSION ON GOVERNMENT PROCUREMENT RECOMMENDED THAT BID PROTEST RESOLUTIONS CONTINUE TO BE CONDUCTED BY THE GAO, THAT STRICT TIME REQUIREMENTS FOR PROCESSING PROTESTS BE ESTABLISHED FOR BOTH AGENCY AND GAO, AND THAT THE DETERMINATION TO AWARD A CONTRACT PRIOR TO RESOLUTION OF THE PROTEST BE MADE ONLY BY A HIGH-LEVEL AGENCY OFFICIAL.

THE POSITIONS OF THE UPS TASK GROUPS AND OF THE COMMISSION WILL BE CAREFULLY CONSIDERED IN DEVELOPING THE UPS. I'M SURE THERE ARE MANY OTHER FACTORS THAT MUST BE WEIGHED IN RESOLVING THIS ISSUE, AND I HOPE ALL FACTORS, INCLUDING THE POSITION OF THE PUBLIC CONTRACT LAW SECTION, SURFACE DURING OUR PUBLIC COMMENT PERIOD.

DEBARMENT AND SUSPENSION

DEBARMENT AND SUSPENSION IS STILL ANOTHER AREA WHERE WE ARE MOVING TOWARD IMPROVING THE PROCUREMENT PROCESS. AS MOST OF YOU KNOW, A NUMBER OF THE SOCIAL AND ECONOMIC LAWS IMPLEMENTED THROUGH THE PROCUREMENT PROCESS AUTHORIZE THE DIRECT DEBARMENT OF A CONTRACTOR WHO FAILS TO COMPLY WITH THE REQUIREMENTS OF THE LAWS IMPOSED BY THE CONTRACT. ADDITIONALLY, THERE ARE DEBARMENTS AND SUSPENSIONS RESULTING FROM CRIMINAL CONDUCT AND CERTAIN UNETHICAL CONDUCT BY CONTRACTORS.

THESE SANCTIONS WHICH VARY DEPENDING UPON THE VIOLATION CAN HAVE SEVERE ECONOMIC CONSEQUENCES FOR BOTH CONTRACTORS AND THEIR EMPLOYEES AND ADVERSELY AFFECT AN AGENCY'S ABILITY TO CARRY OUT ITS PROGRAMS. THUS, THERE IS A NEED FOR CLEAR AND UNIFORM REGULATORY COVERAGE OF DEBARMENT AND SUSPENSION.

THIS NEED HAS RESULTED IN A JOINT VENTURE BETWEEN MEMBERS OF THE OFPP STAFF AND REPRESENTATIVES OF THE EXECUTIVE GROUP TO COMBAT FRAUD AND WASTE IN GOVERNMENT. THIS COOPERATIVE EFFORT WILL RESULT IN PROCEDURES WHICH WILL BECOME PART OF THE FEDERAL ACQUISITION REGULATION, AND AGAIN WE SOLICIT YOUR HELP IN COMMENTING ON THE REGULATION WHEN IT IS PUBLISHED.

CONCLUSION

THE UPS, AS I HOPE YOU CAN NOW APPRECIATE, IS A MAMMOTH TASK. IN STRIVING TO COMPLETE SUCH AN AMBITIOUS EFFORT I THINK IT'S VERY IMPORTANT WE KEEP OUR BASIC GOALS AND OBJECTIVES IN MIND. WHAT WE ARE REALLY STRIVING FOR IS TO IMPROVE COMPETITION AND PRODUCTIVITY. WE WANT TO MAXIMIZE THE FEDERAL USE OF COMMERCIAL PRODUCTS AND PRACTICES, AND IN GENERAL:

1. SIMPLIFY ACCESS TO THE FEDERAL PROCUREMENT PROCESS.

2. ELIMINATE CONFLICTS, INCONSISTENCIES AND REDUNDANCIES FROM PROCUREMENT REGULATIONS AND PROCEDURES.

3. PROVIDE DIRECT, CLEAR AND UNDERSTANDABLE REGULATIONS.

4. REDUCE PAPERWORK AND THE UNNECESSARY USE OF FEDERAL SPECIFICATIONS.

5. PRESENT ONE FACE TO INDUSTRY AND THEREBY MAKE IT EASIER TO DO BUSINESS WITH THE GOVERNMENT.

6. MAINTAIN A WELL-TRAINED, PROFESSIONAL WORK FORCE WITH HIGH ETHICAL STANDARDS; AND

7. PROVIDE REGULAR PROCUREMENT MANAGEMENT REVIEWS WITHIN THE AGENCIES.

OUR OBJECTIVES FOR THE UPS ARE NOT JUST PLATITUDES, I'M CONVINCED (AND I'M SURE YOU ARE TOO) THAT A UPS CAN BE DESIGNED AND DEVELOPED TO ACHIEVE ALL OF OUR GOALS. BY DRAWING ON THE STRENGTHS OF EXISTING PROCEDURES AND REPLACING OUTMODED ONES, WE CAN BUILD A UPS THAT WILL ACCOMPLISH BOTH SOCIAL AND ECONOMIC OBJECTIVES -- A SYSTEM THAT MAINTAINS ITS EQUILIBRIUM AND FAIRLY WEIGHS ALL INTERESTS.

THE UPS MUST FURNISH THE BEST PRODUCT TO THE GOVERNMENT AT THE BEST PRICE. AT THE SAME TIME, IT MUST STIMULATE THE

DEVELOPMENT, GROWTH, AND EXPANSION OF SMALL AND MINORITY BUSINESS AND MAINTAIN THE HEALTH AND VITALITY OF LARGE BUSINESS. THESE ARE NOT MUTUALLY EXCLUSIVE OBJECTIVES. EFFICIENCY, ECONOMY, EFFECTIVENESS AND EQUITY ARE NOT GOOD FOR JUST ONE ELEMENT OF OUR SOCIETY, THEY ARE GOOD FOR ALL.

THANK YOU.

Attachment I

Schedule of UPS Public Hearings

Date	Place of Hearing
August 25-26	Auditorium Transportation Systems Center Kendall Square Cambridge, Massachusetts
September 3-4	Cobo, Hall, Room 3040 One Washington Blvd. Detroit, Michigan
September 5	House Energy Information Center 2121 West Loop South Houston, Texas
September 11-12	New Executive Office Building Room 2008 726 Jackson Place, N.W. Washington, D.C.
September 16-17	Auditorium Department of Water and Power Building 111 North Hope Street Los Angeles, California

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO
22 December 1980

Mr. William R. Smith, Jr., President
American Bar Association
1155 East 60th Street
Chicago, Illinois 60637

Dear Mr. Smith:

In my May 23, 1980 letter to Mr. Janofsky, former President of the American Bar Association (ABA), I pointed out that members of the ABA's Public Contract Law Section were using the ABA to pursue their own special interests under the guise of a professional society. Specifically:

a. The Public Contract Law Section drafted a bill filled with loopholes and special provisions that would substantially strengthen the position of contractors and their lawyers in pursuing contract claims against the Government. The Section obtained the ABA's endorsement and vigorously lobbied Congress for enactment.

b. The Public Contract Law Section lobbied strongly, but unsuccessfully, against amendments which eliminated loopholes and discouraged submission of false claims.

c. Shortly after Congress enacted the amended bill, the Chairman of the Public Contract Law Section announced in the January 1979 issue of the Public Contract Newsletter:

> "On balance, I believe the gains achieved by this legislation outweigh what many in our Section perceive to be serious shortcomings ... Many of these shortcomings can be overcome or lessened by the implementing regulations, and in that large task our concerned committees are busily engaged."

d. The Office of Federal Procurement Policy (OFPP) subsequently issued draft implementing regulations which resurrected concepts sought by the Public Contract Law Section in the ABA version of the bill, but specifically deleted in the statute enacted by Congress.

Since the Public Contract Law Section's activities were aimed at improving the lot of claims lawyers and their clients rather than serving the public, I asked Mr. Janofsky to look into this matter and inform me whether he and others at the head of the ABA endorse the Public Contract Law Section's conduct with regard to the Contract Disputes Act and what action, if any, the ABA intends to take to remedy the situation.

Mr. Janofsky answered my letter on July 17, 1980, shortly before his term as ABA President expired. He forwarded a report prepared

for him by the new Chairman of the Public Contract Law Section, Mr. O. S. Hiestand – a former Government lawyer, now partner in a law firm which represents contractors against the Government.

Since Mr. Hiestand is probably one of the claims lawyers' most energetic lobbyists, it is not surprising that he gives the Public Contract Law Section a clean bill of health. He reports:

> "While the Section was significantly involved in the development of the Contract Disputes Act, and the OFPP implementing regulations, there are no indications that representatives of ABA acted improperly or served self-interests under the guise of ABA. Efforts to reform the remedies system for Federal contracts has been a priority item of the Section for many years. ... The subsequent effort and talent devoted to this effort by members of the Public Contract Law Section have been in the best tradition of public service by members of the legal profession."

What does surprise me is that your predecessor, Mr. Janofsky, would simply turn over the task of reviewing the propriety of the Public Contract Law Section's activities to the Chairman of that Section – a Chairman who is becoming widely known as a spokesman for claims lawyers. I am further disappointed that Mr. Janofsky would then cite Mr. Hiestand's report as basis for concluding that the Public Contract Law Section's activities with regard to the Contract Disputes Act were "balanced," and "in the public interest."

This is exactly the problem I raised with Mr. Janofsky – the ABA "rubber stamping" the work of the claims lawyers in the Public Contract Law Section, thus enabling the claims lawyers to promote their own business interests under the cloak of what purports to be a professional society.

As further evidence that Mr. Janofsky missed the point – whether deliberately or otherwise – his September 24, 1980 letter to me invited my attention to a speech the OFPP Administrator made to the Public Contract Law Section at the ABA convention last summer. The speech contained a paragraph praising the Section for "painstakingly" reviewing each page of OFPP's draft Federal Acquisition Regulations and thanking the Section, and Mr. Hiestand by name, for their "overall efforts to assist OFPP." Mr. Janofsky pointed to that speech as an indication that the Public Contract Law Section is performing a public service.

Having seen a number of Public Contract Law Section positions show up in draft OFPP procurement regulations, it did not surprise me to find words of praise for Mr. Hiestand and his Public Contract Law

Section in the Administrator's speech. Nor was I surprised to learn recently that the OFPP official who supervised the drafting of Contract Disputes Act regulations was subsequently hired by Mr. Hiestand's law firm. I have come to expect such things wherever the Public Contract Law Section is involved.

I doubt that any other group, in or out of Government, has involved itself as much with reviewing OFPP regulations as has the Public Contract Law Section. In fact, that is the problem. The claims lawyers of the Public Contract Law Section have been able to exercise considerable influence in Government procurement matters. The subjects these lawyers deal in are arcane, and the legal implications of their "helpful" suggestions and suggested draft language are not always evident, even among those who work in the field. Their "contributions" however seem always to be in the direction of creating advantages for claims lawyers and their clients in disputes against the Government. Recently, for example, Mr. Hiestand, on behalf of the Public Contract Law Section, petitioned the Office of Federal Procurement Policy to overturn Department of Defense regulations and establish a policy that would permit contractors to stop work on defense contracts in certain contract disputes. The effect of the recommended change would be to increase contractors' leverage in contract disputes with the Government by holding important work hostage to the contractors' demands.

In his report to Mr. Janofsky, Mr. Hiestand contends that the Section's efforts with regard to the Contract Disputes Act are simply attempts to reform the remedies system for Federal contracts along the lines recommended by the Commission on Government Procurement. Since Mr. Hiestand was formerly counsel to the Commission on Government Procurement, he surely must be aware that the causes the Public Contract Law Section have been championing go far beyond the Commission's recommendations. For example, the Commission never recommended authorizing Government agencies to compromise or "horse trade" claims; denying the Government the right to appeal agency board decisions; nor facilitating work stoppages on defense contracts. Moreover, I doubt the Commission on Government Procurement would have opposed, as the Public Contract Law Section has opposed, Congressional efforts to curb the submission of false and inflated claims by requiring claims certification and strict sanctions against false claims.

In responding to criticism that the Public Contract Law Section is being run for the benefit of claims lawyers, Section officials frequently point to a varied membership and urge that more Government attorneys join the Section to participate if the Government interest is not being represented adequately. But why should Government attorneys have to join the Public Contract Law Section in order to ensure that ABA recommendations regarding public contract law will be based on the public good?

Government agencies routinely publish proposed procurement regulations for public comment. Claims lawyers, like any other special interest group, have a right to submit comments and petition the Government in their own behalf. But, it is wrong for claims lawyers to pursue these efforts under the pretense of a public service by the ABA.

I am rapidly coming to the conclusion that the lofty statements of senior ABA officials about wanting to restore public confidence in the legal profession are just words for public relations purposes. In the hope, however, that you might take a more responsible attitude than your predecessors toward this problem, I recommend that you designate respected members outside the Public Contract Law Section to determine:

a. The extent to which the activities of that Section are dominated by claims lawyers.

b. The extent to which the positions promoted by the Section are designed primarily to benefit claims lawyers and their clients in contract disputes with the Government.

c. The extent to which the ABA House of Delegates or other ABA review groups were made fully aware of the cleverly conceived loopholes embodied in the proposed Contract Disputes legislation they endorsed in behalf of the ABA and the effect these would have on the taxpayer.

d. The extent to which senior officers of the ABA were aware of and endorsed the Public Contract Law Section's activities in lobbying the OFPP for regulations more favorable to claims lawyers.

e. The extent to which senior officers of the ABA knew and approved of the hiring by Mr. Hiestand's law firm of a key OFPP official in charge of drafting Contract Disputes Act regulations, after this work was essentially completed.

f. The extent to which they were aware of and approved Mr. Janofsky's turning over to the Chairman of the Public Contract Law Section the job of investigating that very Section. Did they agree with Mr. Janofsky's conclusions?

In conclusion, I invite your attention to the warning Chief Justice Burger issued in a speech last summer concerning the legal profession. He said:

> "If we ever succumb to the idea that the organized bar is a body established for the mutual protection of its own members, we will not deserve – and we will not <u>have</u> – the confidence of the American Public."

I would appreciate receiving a prompt and substantive reply to this letter. On the other hand, if you and your ABA House of Delegates are not concerned with the problems I have raised, please say so. There is no need to go to the trouble that Mr. Janofsky and Mr. Hiestand did to create the impression of action, simply for "window dressing."

Sincerely,

H. G. Rickover

Attachments:
My letter to Mr. Janofsky dtd May 23, 1980
Mr. Janofsky's letter to me dtd July 17, 1980
Mr. Janofsky's letter to me dtd Sept. 24, 1980

Copy to:
Chief Justice of the United States
Attorney General of the United States
Director, Office of Management & Budget
General Counsel, Department of Defense
General Counsel of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command
Counsel, Naval Sea Systems Command
Deputy Commander for Contracts, Naval
Sea Systems Command

AMERICAN BAR ASSOCIATION

OFFICE OF THE PRESIDENT
WM. REECE SMITH, JR.
AMERICAN BAR CENTER
CHICAGO, ILLINOIS 60637
TELEPHONE 312 / 947 4042

PLEASE REPLY TO:
POST OFFICE BOX 3239
TAMPA, FLORIDA 33601
TELEPHONE 813 / 223-5366

January 28, 1981

Admiral H. G. Rickover
Department of the Navy
Naval Sea System Command
Washington, D. C. 20362

Dear Sir:

I respond to your letter of December 22, 1980, which reached me at my Tampa office after the New Year.

Your letter suggests that members of the ABA's Public Contract Law Section have acted through the ABA in their own interests and that of their clients. You also take issue to some extent with the response of my predecessor in office to an earlier letter you addressed to him on the subject. You ask in particular, however, that inquiry be made as to six specific issues set forth on page four of your letter to me.

The American Bar Association is a responsible organization and it is quite willing to respond to inquiry and criticism. On its behalf I shall respond hereafter to the specific issues you have raised. However, I am not willing to appoint members of the Association, either inside or outside the Section, to investigate those issues because, in my opinion, the charges to which they relate are so sweepingly stated and so lacking in detail that inquiry would be wasteful and ineffective.

My response to the questions you pose on page four of your letter to me follows. In responding, I wish it to be clearly understood that I do not accept or endorse any statement contained in your letter except to the extent that I may agree with it specifically hereafter. My responses, which I seek to express candidly and in good faith, are:

1. You ask: "[T]he extent to which the activities of (the Public Contract Law Section) are dominated by claims lawyers."

By "claims lawyers" I understand you to mean lawyers who represent citizens who enter into contractual relationships

with the federal government. I believe that a majority of the Section's members provide such representation. However, as Mr. Janofsky noted in his reply to you, the Section's membership also includes government lawyers, academicians and other lawyers. Thus, in one sense, it may be said that the activities of the Section are dominated by lawyers who represent contractors. In another, which my experience teaches is more realistic, Section activities are not consistently dominated by any category of members. Rather the interest taken in given activities, and the positions taken on specific issues, vary among the total membership depending upon the particular activity or issue.

2. You ask: "[T]he extent to which positions promoted by the Section are designed primarily to benefit claims lawyers and their clients in contract disputes with the Government."

If the Section ever promotes positions designed primarily to benefit "claims lawyers" and their clients, I am not aware of it. It should never happen.

The important point to note, however, is that any position this or any other Section advances - whatever the motive - must be presented either to the Board of Governors or to the Association before action can be taken upon it. Both the Board and the House take great pains to assure that the actions of these bodies are never taken primarily to benefit lawyers or clients who have a special interest in the outcome. Rather we seek to address matters of public and professional interest on the basis of general principle. No doubt some action taken on that basis by the Board or the House does at times benefit lawyers and clients who have occasion to become involved in contractual negotiations or disputes with the federal government. That, however, is not the purpose or intention of those taking the action. Indeed we seek to avoid it and those participating in the process, if any, who have special interests in the outcome must disclose that interest. To summarize, our concern is with the propriety of the action taken as a matter of general principle, having due regard for concerns of those who govern and are governed.

3. You ask: "[T]he extent to which the ABA House of Delegates or other ABA review groups were made fully aware of the cleverly conceived loopholes embodied in the proposed contract disputes legislation they endorsed in behalf of the ABA and the effect these would have on the taxpayer."

In responding, I do not approve such loaded terms as "cleverly conceived loopholes". Rather I seek to reply in good faith despite them. Only the Board of Governors or the House of Delegates of the Association can approve legislation or legislative action in behalf of the ABA. The Board and the House are composed of able lawyers who are loyal Americans. Their members are well informed and educated. The members vary widely in background, political affiliation and geographical location. They have opportunity to study in advance each item of proposed legislation which those bodies endorse and the proposed legislation is also critically examined in debate. Thus those taking action may be held responsible for knowledge of any "loopholes" they approve. But they do not design or approve "loopholes" either specifically to benefit the profession and those it serves, or otherwise. Members of the Board and House are also citizens and taxpayers. They seek as experts in the law to take action which they deem to be in the public interest.

4. You ask: "[T]he extent to which senior officers of the ABA were aware of and endorsed the Public Contract Law Section's activities in lobbying the OFPP for regulations more favorable to claims lawyers."

It is difficult to respond accurately to this question without better definition of the activities and regulations to which you refer. Representatives of the Association and the Section are authorized to exercise the constitutional right to petition government in support of, and consistent with, any position adopted by the Board or the House of Delegates, or approved otherwise by Association procedures. We have a permanent staff in Washington, D. C. to assist in this regard. One responsibility of the staff is to assure that lobbying activities carried out in the name of the Association are authorized by and are consistent with the authority given by

the Association. The staff advises me that it has no knowledge of Section activity which is inconsistent with established Association policy. The senior officers know of none. Moreover, neither the staff nor the officers has received any complaint regarding the Section from members of Congress, from DOD, from OFPP or, indeed, from anyone other than you.

5. You ask: "[T]he extent to which senior officers of the ABA knew and approved of the hiring by Mr. Hiestand's law firm of a key OFPP official in charge of drafting Contract Disputes Act regulations, after this work was essentially completed."

So far as I know, no senior officers of the ABA knew and approved of the employment to which you refer. Your letter to me was my first knowledge of the matter.

Since the employment to which you refer occurred after the drafting work of the official was completed, I certainly am not willing to conclude that the official, while employed by the government, acted illegally or unethically in some way designed to benefit Mr. Hiestand's firm or its clients and to disserve the Government. If you have evidence to that effect, I respectfully suggest it should be reported at once to appropriate government officials and, if the individual to whom you refer is a lawyer, to the bar association of which he or she is a member.

6. You ask: "[T]he extent to which they (senior ABA officers) were aware of and approved Mr. Janofsky's turning over to the chairman of the Public Contract Law Section the job of investigating that very Section. Did they agree with Mr. Janofsky's conclusions?"

So far as I know Mr. Janofsky was not asked to cause an investigation to be made of the Section. Rather, he received a complaint to which he quite properly requested a response from the chairman of the Section. Apparently he was satisfied with the response. In any event, Mr. Janofsky did not consult me, and I doubt that he consulted other officers, before referring the matter to the chairman. Our procedures do not require him to do so.

As to the second part of this inquiry, it is not clear to me what conclusions you refer to. If you mean those stated in Mr. Janofsky's letter to you of July 17, 1980, I received a copy of that letter after it was mailed to you and it is likely other officers did likewise. Speaking for myself, I had no reason then, and I have none now, to differ with the statements made by Mr. Janofsky.

Please understand, Sir, I seek to respond to your concerns forthrightly. If you wish further information, please advise me and I shall seek to oblige. Allow me to stress, however, that if you choose to pursue this matter further, it would be most helpful if you would be precise in your statements of allegation and fact. Clear definition of the actions complained of, the individuals involved, dates, places, etc., would enable me, in turn, to be more precise in my responses to you and otherwise to be better informed in seeking to act in the premises.

Respectfully,

Wm. Reece Smith, Jr.

WRSjr/bv

cc: Chief Justice of the United States
Attorney General of the United States
Secretary of the Navy
Leonard S. Janofsky, Esq.
O. S. Hiestand, Esq.

Efforts of the American Bar Association's (ABA) Public Contract Law Section to promote Compromise and Settlement of Claims Without Regard to Merit

1. The report of the Commission on Government Procurement dated December 1972 recommended:

> "Empower contracting agencies to settle and pay, and administrative forums to decide, all claims or disputes arising under or growing out of or in connection with the administration or performance of contracts entered into by the United States."

The discussion in the Commission report immediately following this recommendation makes it clear that the sole purpose of this recommendation was to eliminate a particular jurisdictional problem where a contractor places a certain type of claim before the wrong forum.

2. The contract disputes bill drafted and promoted by the Public Contract Law Section was approved by the ABA House of Delegates in 1976. The section of this bill "based" on the above Commission recommendation stated:

> "Each executive agency is authorized to settle, compromise, pay, or otherwise adjust all contract claims of whatever nature by or against, or dispute with, a contractor relating to a contract entered into by it or another agency on its behalf..." (emphasis provided)

Notice the addition of the word "compromise" to the ABA bill. A recommendation to eliminate a jurisdictional problem has become a

loophole for "horsetrading" of claims without regard to merit and without Congressional review.

3. In their prepared statement for the Senate hearings on the contract disputes bill, the ABA's Public Contract Law Section commented on the bill's provision to authorize compromise of claims:

> "... Section 4 of the bill authorizes the executive agencies to settle and compromise claims. The specific announcement of this authority is extremely important since settlement by compromise is the most efficient means of resolving disputes, in view of the cost and time involved in any adversary process. Any language limiting this authority would have a chilling effect on settlement and promote more litigation."

These ABA representatives clearly understood the language of this section of the ABA bill provided for something different than what was recommended by the Commission on Government Procurement.

4. In defense of the Public Contract Law Section and the ABA contract disputes bill's provision for compromise and settlement of claims without regard to merit, the Chairman of the Section stated in a July 9, 1980 report, "Comments on Rickover Letter to Janofsky":

> "The language incorporated in the ABA bill ... expressly authorizing compromises and settlement of claims, was based on the 1972 recommendations of the Procurement Commission."

5. In passing the Contract Disputes Act of 1978, Congress deleted the language promoted by the Public Contract Law Section to allow agencies to "horsetrade" or "compromise" claims independent of merit and without Congressional review. The Joint Report of the Senate Government Affairs and Judiciary Committee noted:

> "... it is not the intent of this section to authorize Agency heads, contracting officers, or agency boards to settle or compromise claims independent of their legal or contractual merits, except as specifically authorized by other statutes such as Public Law 85-804."

6. In the January 1979 issue of the Public Contract Newsletter, the Chairman of the Public Contract Law Section discussed the Contract Disputes Act and stated:

> "In other respects, however, the Contract Disputes Act of 1978 falls short of Association or Section objectives. The explicit authorization of contracting agencies 'to settle, compromise, pay, or otherwise adjust any claim by or against, or dispute with a contractor' was deleted out of concern of potential overlap with the discretionary authority to grant relief solely authorized by Public Law 85-804...
>
> "Many of the shortcomings can be overcome or lessened by the implementing regulations, and in that large task our concerned committees are busily engaged."

7. The influence of the Public Contract Law Section to "overcome" the "shortcomings" of the Contract Disputes Act was evident in an early draft of the Office of Federal Procurement Policy (OFPP) implementing regulation for the Contract Disputes Act. The following

clause from the draft regulation effectively reinstates the provision for "horsetrading" and "compromise" of claims specifically deleted by Congress:

> "At any time prior to an appeal to a Board of Contract Appeals or suit in court, an agency shall afford a contractor at least one opportunity for an informal conference with the agency for the purpose of considering the possibility of disposing of the claim by mutual agreement ...
>
> "If the agency conferees determine that the claim or dispute should be settled, compromised, paid, or otherwise adjusted by mutual agreement, they shall make a written report to the agency head within thirty days of the conference detailing the basis for their determination and recommending exercise of his settlement authority. The agency head shall act pursuant to his settlement authority within sixty days or later if mutually agreeable between the contractor and the agency head, after receiving the agency conferees' report and recommendations." (emphasis provided)

THIS STATEMENT REFLECTS THE VIEWS OF THE AUTHOR AND DOES NOT NECESSARILY REFLECT THE VIEWS OF THE SECRETARY OF THE NAVY OR THE DEPARTMENT OF THE NAVY

STATEMENT
OF
H.G. RICKOVER, ADMIRAL, USN
BEFORE THE SENATE GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON FEDERAL SPENDING AND
THE SENATE JUDICIARY SUBCOMMITTEE ON
CITIZENS AND SHAREHOLDERS RIGHTS AND
REMEDIES

JUNE 14, 1978

Thank you for the opportunity to comment on the Contract Disputes Act of 1978, S3178.

For more than 35 years, as head of the Naval Nuclear Propulsion Program and in previous assignments, my technical responsibilities have required that I deal with many different companies, large and small, in American industry. My comments on the bill are based on this experience.

No doubt there are cases where contractors--particularly small contractors--have encountered unwarranted delay in obtaining a just settlement from a Government agency. I suspect some of these cases prompted this bill, the stated purpose of which is to "Equalize the bargaining power of the parties when a dispute exists," and to "Insure fair and equitable treatment of contractors and Federal agencies."

Obviously, the Government should recognize and pay valid claims. It should also provide for prompt settlement of contract disputes. However, in considering this bill, it is important

Enclosure (3)

to recognize that not all claims against the Government are valid. In some cases large contractors and their professional claims teams generate frivolous claims and contract disputes.

Some of these large contractors, their lobbyists, and claims lawyers have seized upon omnibus, vague, unsubstantiated claims as a possible solution whenever their performance on Government contracts results in losses or less than the profit they desire. These contractors command vast legal, financial, and lobbying resources in pursuing the claims route. To gain sympathy in Congress and elsewhere they clothe themselves in the mantle of the small company and pretend they are no match for the Government. In fact, just the reverse is true.

In trying to streamline contract dispute procedures for valid claims, we need to establish procedures to discourage contractors and law firms who develop and prosecute grossly inflated claims in an attempt to get more from the Government than they are legally owed. In this regard I am concerned that the bill provides many loopholes which large, influential contractors can exploit at a time they already have a distinct advantage over the Government in contract disputes and litigation. In this climate, I believe the proposed bill would:

- Place the Government at a substantial and unfair disadvantage, particularly in relation to large contractors.
- Encourage Government officials to settle claims and contract disputes independent of their legal merits and to circumvent existing safeguards prescribed by Congress in cases where extra-contractual relief is authorized.

- Encourage contractors to submit unfounded claims and hold out for settlements in excess of amounts legally owed by the Government.

My misgivings about the proposed Act stem directly from my experience with Navy shipbuilding claims. I have testified at length to other committes of Congress regarding those claims, and the problems with the Armed Services Board of Contract Appeals. For example, I testified on these matters before the Joint Economic Committee on December 29, 1977 and before the House Appropriations Committee on March 16, 1978. I recommend that you include that testimony in the record of your hearings today, because it is against the background of the shipbuilding claims that my comments on the proposed Act are based.

Briefly, the shipbuilding claims situation is this:

- The Navy has a $2.7 billion backlog of outstanding shipbuilding claims, mostly from three major shipbuilders. These claims break down as follows:

  Newport News (a subsidiary of Tenneco)--$742 million;

  Electric Boat (a division of General Dynamics)--$544 million;

  Litton Shipbuilding (a division of Litton Industries)--$1.2 billion.

- Detailed Navy analysis of these claims show that the claims are grossly inflated. The claims allege Navy responsibility for many items which are, in fact, the contractor's responsibility.

- The Justice Department is currently investigating the possibility of criminal fraud in connection with these shipbuilding claims. Litton has already been indicted; the Electric Boat and Newport News claims are under investigation.
- Some shipbuilders spend years and millions of dollars trying to build a basis for their claims. Many claims are based on what the contractor wants to recover, rather than what the Government legally owes. The claims frequently fail to show the relation between the alleged Government actions and the amount claimed.
- It takes large amounts of time and manpower for the Government to evaluate these claims. To handle the influx of these large shipbuilding claims, the Navy had to establish a special Navy Claims Settlement Board. This Board, with the help of technical, legal, contractual, and accounting experts, spent a year and a half evaluating the Newport News and Electric Boat claims. Since the end of 1972, the Navy has spent $55 million processing shipbuilding claims.
- Shipbuilders and their parent conglomerates have used grossly inflated claims and threats to stop work in an effort to force the Navy to pay more than it legally owes. The Navy is vulnerable because establishing alternate shipbuilding sources would probably delay important programs and cost hundreds of millions of dollars.

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- Shipbuilders use outside law firms and large claims teams to prepare and prosecute their claims. The Navy cannot apply anywhere near comparable resources without neglecting ongoing work.
- Contractors can often avoid reporting losses to stockholders by reporting as income, their own estimates of the amounts expected to be recovered against claims. In this way, all three shipbuilders have based their profit reports on the presumption that the claim settlements will be high enough to avoid a loss. In this situation contractors have a strong incentive to stretch out contract disputes whenever the Government settlement offers are less than amounts they have already booked against the claims.
- In recent years some senior defense officials have tried to settle claims by "horsetrading". But they have been constrained by the knowledge that Congress must review any extra-contractual payment in excess of $25 million.

Section 4 of the bill states: "Each executive agency is authorized to settle, compromise, pay, or otherwise adjust any claim by or against, or dispute with, a contractor relating to a contract entered into by it or by another agency on its behalf, including a claim or dispute initiated after award of the contract based on breach of contract, mistake, misrepresentation or other cause for contract modification or recision...."

This is, in my opinion, the most serious loophole in the proposed Act. It will undoubtedly be construed as Congressional authorization for agencies to settle claims independent of their legal merits. This is what large defense contractors have wanted for years. I believe this provision will also be construed as nullifying the need for Congressional review of extra-contractual settlements.

I believe that Government agencies should be precluded by law from paying out Government funds except for legal obligations of the United States. The only exception to this should be as specifically authorized by Congress such as in the case of PL 85-804, which authorizes extra-contractual relief to facilitate the national defense.

I recommend that the bill be revised to require that any settlement of a claim against the Government must be supported by a formal opinion by the General Counsel of the agency involved that the contractor is legally entitled to the settlement and that the terms and the amount are substantiated.

Double Standard

The bill applies a double standard which favors the contractor. Specifically:

- Contractors would have the option to apply any provisions of S3178 retroactively to existing claims or contract disputes. For the Government, the bill would apply only to contracts entered into 120 days after passage of the bill.

- Contractors would have 12 months, and even longer to appeal from an agency board's decision. The Government is limited to 120 days.
- The small claims special procedure provides that the contractors can appeal to the courts and get a trial de novo, if they are dissatisfied with the board's decision. But, the Government is bound by the board's decision, except in the case of fraud.

Even in relatively minor items, the double standard persists. A contractor's time to appeal from an agency board decision runs from the date of receipt of the decision; the Government's time is measured from the date of the decision.

I recommend that the bill be modified to ensure that in contract disputes the rules applied to the Government are no less favorable than those applied to contractors.

60 Day Limit for Contracting Officer Decisions

Section 5 provides that contractors can demand a contracting officer's decision within 60 days of the submission of the claim. If the contracting officer does not issue his decision in that period, the contractor can appeal directly to the agency board or to the courts.

In dealing with large, unsubstantiated claims, the 60 day time limit is unrealistic. Shipbuilding claims are voluminous--large claims teams directed by high priced claims lawyers often spend several years preparing them. Newport News claims alone total 64 volumes, each about 2 inches thick. In these

circumstances, a 60 day time limit means that contracting officer decisions would have to be issued without proper analysis of the claim. Further, the length of time required to analyze a claim depends on how well it is substantiated and on the willingness of the contractor to deal with the claim on its actual legal merits. In these circumstances, I question the wisdom of establishing arbitrary time limits for contracting officer decisions.

Appeals from Board Decisions

The proposed Act provides that the contractor may appeal to a court "...within twelve months from the date of receipt of the agency board's decision, final delivery of supplies or performance of work under the contract, or acceptance where required, whichever is later." Shipbuilding contracts frequently require ten or more years to complete. Because of long fabrication times, numerous other Government contracts require many years to complete.

This provision would enable large contractors to keep alive the possibility of an appeal for years--long after the Government's witnesses and records are gone. The time limit for contractor appeal should be fixed. Twelve months from the date of the decision should be ample time for a contractor to decide whether to appeal. The Government should also have the same period of time in which to appeal.

Government Appeals of Adverse Board Decisions

The proposed Act gives the Government the right of appeal from adverse agency board decisions. This is an important right which I have long advocated.

Today, defense contractors have the right to appeal Armed Services Board of Contract Appeals (ASBCA) decisions to the Court of Claims. But Defense Department officials contend they do not have a similar right. Therefore, they do not appeal ASBCA decisions. The ASBCA has rendered some highly questionable decisions against the Government--decisions in which the Board, in effect, has established new law. For example:

- The Board ordered the Navy to pay Lockheed $62 million on a $160 million claim which the Navy had valued at only $7 million. Without considering the merits of the claim, the Board ruled that statements a former Deputy Secretary of Defense made to Lockheed's bankers and others effectively bound the Government to a $62 million settlement. By its ruling, the Board, which derives its authority solely from the Secretary of Defense and from the Secretaries of the three military services, authorized a settlement which even the Secretary of Defense could not have authorized without recourse to PL 85-804.

- The ASBCA recently awarded Litton $50 million against a $131 million Litton shipbuilding claim. In so doing the Board set new legal precedents. Specifically, the Board:
  (1) Ordered the Navy to pay costs incurred on commercial ships built by Litton because of contract changes issued under Government contracts.
  (2) Allowed claims on items for which the company had previously been paid, and for which it had granted the Navy claims releases.
  (3) Evaded the Court of Claims prohibition against the payment of interest by awarding Litton $9.8 million as "profit for use of capital."

Issues such as these should not be settled by administrative boards. They should be settled in court, where legal rulings can be appealed.

The bill gives the Government the legal right to appeal a decision. However, the bill requires prior approval by the Administrator for Federal Procurement Policy for any proposed agency appeal. This requirement should be eliminated. Those who are neither responsible for getting the work done, nor for litigation in court, should not be given veto rights over decisions to appeal. The Department of Justice provides ample check against irresponsible appeals by Government agencies. The inclusion of others in the approval chain serves only to give large defense contractors other forums in which to lobby, as well as other hurdles which Government agencies must surmount.

Recommended Additions to the Bill

What I have said so far concerns the provisions of the bill as it now stands. The following provisions should be added to speed up the contract disputes process:

1. Require as a matter of law that, prior to evaluation of any claim, the contractor must submit to the Government a certificate signed by a senior contractor official, which states that the claim and its supporting data are current, complete, and accurate. Some contractors contend that they are not required to disclose any facts which would undermine their claims.

2. Contractors should also be required to show how the alleged Government action resulted in additional costs in the amount claimed. Some contractors simply make general allegations and then claim that the Government is totally responsible for all their cost overruns.

3. Contractors should be required to submit their claims within a prescribed period--say 30 days--of the actions or events which gave rise to the claims. This will permit analysis of the claims at a time when all facts are fresh in the minds of the parties, and thus will cut down the time required to research and complete the Government's review.

4. Prohibit contractors from changing their claims after they have been finally submitted to the contracting officer. Following review by the Government, contractors should be given the opportunity to furnish additional information needed to support the claim where the Government review has indicated weakness. However, new theories of entitlement and new claims submissions covering the same issue should be barred. Often

the Navy's claims analysis effort has been frustrated by the constant revising of claims.

5. Prohibit admission of evidence before boards of contract appeals or courts unless such evidence has been presented to the contracting officer for his consideration in making his decision. Today a contractor can present to an appeals board an entirely different case than he has presented to the contracting officer.

6. Make any material obtained by contractors under the Freedom of Information Act, which is not obtainable by discovery proceedings, inadmissible against the Government before any board of contract appeals or in any litigation. As it now stands, contractors can circumvent board or court restrictions on discovery by using the Freedom of Information Act. The Government has no such comparable right.

7. Prohibit Government agencies and boards of contract appeals from doing business with law firms which violate the American Bar Association's Code of Professional Responsibility. The Defense Department tends to conduct business with lawyers and law firms without considering whether they conduct themselves in accordance with the standards prescribed by their profession.

8. Require boards of contract appeals to decide cases on their legal merits and prohibit them from exercising authority which even the head of the agency that appointed them cannot exercise. No administrative board should arrogate to itself greater authority than the official who established it.

9. In the case of the large, so-called omnibus claims, the costs incurred by the Government in evaluation of invalid portions of claims should be set off against the amount determined to be legitimately owed. This would discourage contractors from using frivolous items in their claims.

AMERICAN BAR ASSOCIATION

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December 14, 1981

Admiral Hyman G. Rickover
Naval Sea Systems Command
U.S. Department of the Navy
Washington, D.C. 20362

Re: 24 August 1981

Dear Admiral Rickover:

Shortly after I assumed office, you telephoned me and we talked at length concerning your complaints about actions taken by our American Bar Association Section of Public Contract Law. At my request you then wrote me under date of August 24, in answer to my request for more specificity. I advised you during our conversation that I would not be able to answer immediately, and you indicated that reasonable promptness would indicate an answer before the end of the calendar year. That date is fast approaching and I am now replying herewith to your letter of August 24.

Since our earlier communications I have reviewed your letter of August 24, your earlier letters to my predecessors, Mr. Janofsky and Mr. Smith, and Mr. Smith's letter to you dated January 28, 1981. I have also read the materials you enclosed and conducted some investigation, both through the Public Contract Law Section itself and independently through members of my own staff. I have found nothing to indicate that the Section is actuated by anything other than its view of the public interest, taking that as a totality and not from any single point of view. I hasten to add that I also believe that you, too, are motivated strictly by your perception of the total public interest. What seems to be occurring is that reasonable persons of good will can differ as to both the ingredients of the total public interest and the weight to be assigned each ingredient. I find no evidence of improper motivation on either side. I also find that government itself is much divided on some of the questions about which you feel strongly.

It is obvious that you are displeased with the positions advocated by the ABA Public Contract Law Section. But I do not find that the Section's activities have been improper or warrant the strong criticism contained in your letters. It is my understanding that the fact is that the Section is highly regarded by the public procurement community, and its views on important procurement issues are sought and respected by both the organizations of the Executive Branch and the committees of the Legislative Branch that are concerned with procurement policy.

In the specific instance of the Contract Disputes Act, I find no improper conduct by the Section. As you point out in your letter, contract disputes policy raises arcane and complex questions of fact, and inevitably there will be disputes about the best policy. As I have suggested, I think your disagreement with the Section reflects a disagreement over the end goals of our public policy.

You have suggested that the Section is merely a disguise for what you term "claims lawyers" plying their trade. The facts are that neither the Section nor its Council is dominated by claims lawyers or any other single point of view. The Section, of course, is open to any lawyer who joins the ABA and has an interest in public contract law, and its membership does reflect a wide diversity of viewpoints. Many government-employed lawyers are members, and the Section continually urges others to join. As indicated, experience teaches that even those lawyers in government do not speak with a single voice.

Due to their knowledge and expertise, claims lawyers have undoubtedly at times influenced the outcome of Section policy deliberations. But I think, at most, they bring a point of view rather than represent clients. I am satisfied that the claims lawyers, like other members holding different views in the Section, are acting on what they believe to be the public interest. Your own point of view, I assume, could be summarized by saying: "I'm for whatever gets us the submarines the cheapest." If that is correct, it seems to me that you should applaud many actions the Section has taken, including its Recommendations passed at the August meeting relative to the Davis-Bacon Act, but you do not mention any actions except those in which you do not agree with the result.

In sum, I am convinced that the Section has not acted improperly and intend no further action in this matter of long-standing discussion over what is in the national interest.

As an American, I have been glad that you were on our side instead of some other. Your intelligence and single-minded devotion to better defense have been a national asset. I was sorry to learn recently that your official duties will soon cease. I certainly congratulate you on an official career of great achievement on behalf of our nation.

Sincerely yours,

David R. Brink

David R. Brink

DRB:sh

cc: Morris Harrell, President-Elect
Eugene C. Thomas, Esq.
Marshall J. Doke, Jr., Esq.
Thomas H. Gonser, Esq.
H. Eugene Heine, Esq.
Harriet Wilson Ellis
Richard B. Muller, Esq.

DEPARTMENT OF THE NAVY
NAVAL SEA SYSTEMS COMMAND
WASHINGTON, D.C. 20362

IN REPLY REFER TO

31 December 1981

Mr. David R. Brink
President
American Bar Association
2200 First Bank Place East
Minneapolis, Minnesota 55402

Dear Mr. Brink:

In my letter to you dated August 24, 1981 I reported examples of apparent improprieties associated with the activities of the American Bar Association's Public Contract Law Section. I questioned the practice of claims lawyers in the Public Contract Law Section promoting, in the name of a professional society, legislation and regulations which would give them a substantial edge in prosecuting contract claims against the Government.

Your response of December 14, 1981 creates the appearance of a thorough review of the matter, but avoids dealing with the specifics. Although more skillfully drafted, and diplomatic, it is essentially the same reply as that I received on the same subject from your two predecessors. In short, you find nothing wrong with the Section's actions and intend to do nothing further. In response to my concern about undue influence of claims lawyers in the Public Contract Law Section, you merely point out that many Government attorneys are members, that even they do not speak with a single voice.

Considering how assiduously the ABA portrays its work as the profession's contribution to public service, I had hoped that those at the top of your organization would be upset to learn how some members of the Public Contract Law Section have been pursuing, in name of the ABA, their own special interests. After three successive ABA presidents have concluded that there is nothing improper about these activities, I finally understand there is nothing to be gained by pursuing this matter further with the ABA; that its paramount purpose and its policies are aimed at protecting the welfare of its members — but not of the public.

I again urge that you give consideration to a suggestion I previously made to change the ABA's name to the "American Bar Protective Association". This is more descriptive and will serve to alert the unwary of the primary function of your organization.

Sincerely,

H. G. Rickover

H.G. Rickover

Copy to:
Attorney General of the United States
General Counsel, Department of Defense
General Counsel, Department of the Navy
Chief of Naval Material
Commander, Naval Sea Systems Command
Counsel, Naval Sea Systems Command
Deputy Commander for Contracts, Naval Sea Systems Command